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NOTES.

WHAT is a lottery? *Hall* v. *Cox*, '99, 1 Q. B. 198, 68 L. J. Q. B. 167, C. A., does not answer this question, but it does show that a competition for a prize may look uncommonly like a lottery and yet not be one. The publishers of a newspaper offered a prize of £1,000 to any man who, under and subject to certain conditions, should predict correctly the numbers of male and female births and the number of deaths in London during the week ending on a given day in December 1897. *A*, owing to luck or skill, made the required prediction and claimed the prize, and on its being refused, brought an action for the amount. The publisher of the newspaper then, somewhat meanly as it would seem, raised the defence that the competition for the prize was a lottery. The judge held the defence good. The Court of Appeal have pronounced it bad, on the ground that to run a competition on to a lottery success must be a matter depending entirely upon chance. Unless this decision, which seems to be in harmony with *Caminada* v. *Hulton*, '91, 60 L. J. M. C. 116, and *Stoddart* v. *Sagar*, '95, 2 Q. B. 474, be overruled by the House of Lords, *A* will be lucky enough to win his £1,000.

Hall v. *Cox* and the decisions by which it is supported raise two questions which are certainly curious and may be important.

First, is it possible in the face of the existing decisions to put down lotteries?

If a prize competition is not legally a lottery; if the result depends in any degree, however small, upon skill, ingenious persons who profit greatly by the public love of gambling, will assuredly soon invent plenty of methods for opening competitions which involve all the evil without coming within the legal definition of lotteries.

Secondly, what are the valid grounds for forbidding lotteries?

Whenever an honest lottery is set up, the person who buys a ticket does so with his eyes open. It is idle to contend that he

gets nothing for his money. He gains two advantages which many men in all ages have valued very highly. The one is the excitement of gambling, the other is the possibility of gaining wealth, and of gaining it without trouble. If the lottery is for a charitable or quasi-charitable object he may also gain the spiritual advantage of a good conscience. Under these circumstances it is very difficult for any one who in the main agrees in the doctrine as to the proper limits of human liberty which some forty years ago were laid down by Mill, and accepted by the educated opinion of Englishmen, to say why lotteries should be held illegal.

If few thinkers to-day hold themselves intellectually estopped from questioning the absolute soundness of Mill's doctrine, fewer still will maintain that the English Courts have succeeded in drawing rightly the line which divides legitimate from illegitimate competition for prizes. If, as seems admittedly the case, the 'missing word' competition (*Barclay* v. *Pearson*, '93, 2 Ch. 154, 62 L. J. Ch. 636) constitutes a lottery and is illegal, it is difficult to argue that on any ground of public expediency a competition in guesses as to the number of deaths in a particular week should be held a legitimate effort of skill. There is no doubt this difference in fact, that the 'missing word' might be any one of a dozen, while in this case there was a real field for the statistical expert. Whist is not a mere game of chance, though the superior chance in the long run in favour of good as against indifferent play is said to be only a small percentage. Even a 'missing word' competition might not be a mere lottery if the determination of the word could be reduced to rules of grammar or style.

A is employed in a pottery. His duty is to make balls of clay and hand them to the woman working at a machine. He is forbidden to interfere in any way with the machinery. In spite of this he attempts to clean the machine during the absence of the woman, and in the course of doing this breaks his fingers. He claims compensation from his employer under the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), as for an accident 'arising out of or in the course of his employment.' The Court of Appeal has held that *A* is not entitled to compensation. *Lowe* v. *Pearson*, '99, 1 Q. B. 261, 68 L. J. Q. B. 122, C. A. The Court may be charged by some persons with not giving full effect to the Workmen's Compensation Act, 1897. Yet the judgment of the Court is clearly right. A person who is employed to do one thing, when he hurts himself in doing another thing which he is expressly forbidden to do, cannot, with any show of reason, maintain that he is injured in the course of his employment.

Mr. Senior was a good and kind father, and bore among his neighbours an excellent character for general good conduct. He was, however, and no doubt still is, convinced on religious grounds that to employ medical help in case of illness shows a want of faith in God and is therefore a sin. Of his twelve children, seven have already died, and some of them, it is believed, for want of medical care. He recently in the case of the illness of one child, an infant, nine months old, refused to obtain medical advice though the child was most seriously ill. The child died; it might probably have been saved, had medical assistance been procured. Mr. Senior was in consequence indicted for and found guilty of manslaughter under the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 1, and his conviction has been upheld by the Court for Crown Cases Reserved. These are the brief facts of *R.* v. *Senior*, '99, 1 Q. B. 283, 68 L. J. Q. B. 175. They give occasion for reflection.

The Peculiar People, the sect to which Mr. Senior belongs, will no doubt hold him a martyr, and a good number of well meaning persons, who do not share his views, will say that he is the victim of persecution. This notion, widespread though it be, rests on a confusion of thought, and could have obtained currency only at a time when the habit of toleration had made people forget what persecution really meant. 'The word to persecute,' says Johnson, 'is generally used of penalties inflicted for opinions.' Persecution is, to put the matter briefly, punishment on account of opinions. Where persecution took its most severe form, persons were punished, and it might very well be with death, on the ground that they held, or were supposed to hold, certain opinions or beliefs, or, to put the matter in a concrete form, on the ground in one country of their being Jews, Protestants, or otherwise heretics, in another of their being Catholics. Where persecution took a milder shape persons were punished not for holding a belief, e. g. for being Protestants, but for attempting to propagate their belief or heresy, e. g. in Spain to convert Catholics to Protestantism. But whatever form persecution took it was always at bottom punishment for the holding or the propagation of opinions. Now of persecution in this sense there is in Mr. Senior's case none whatever. No one punishes him for holding, for teaching, or for preaching the doctrines of the Peculiar People. He is sent to prison not because he teaches a doctrine but because he does a particular act, namely neglects to supply his child with medical aid.

Of course to prove that Mr. Senior is not persecuted does not show that he may not be ill used. Still it goes a good way to free people's minds from a subtle confusion of ideas. Those who think Mr. Senior a martyr argue, in effect, that a man ought never to be punished for conduct which is dictated by good motives, and that, as Mr. Senior believed that in not sending for a doctor he was obeying the precepts of the Bible, it is unjust to send him to prison. No man, to put this view in its popular form, ought to be punished for obeying his conscience. Let us see for a moment what are the results to which this dogma leads. A Jesuit who kidnaps a Protestant child in order to carry him abroad and educate him in the true faith, a robber who steals money from the rich because he wishes to give it to the poor, a doctor whose eccentric benevolence leads him to poison persons desperately sick in order to free them from pain, a fanatic who assassinates a President or a Tsar in order to avenge the wrongs inflicted by society upon the suffering masses of the people, may each and all of them act from exalted motives. The Thugs committed wholesale murder from purely religious motives, and believed that they were conferring spiritual benefit on their victims. Yet common sense assures us that each and all of these enthusiasts ought to be severely punished. The simple truth is that any argument meant to prove that it is in itself wrong to inflict penalties on a member of the Peculiar People for obeying his conscience must always lead to the conclusion that no man must be punished for doing what he thinks right. But this plea is necessarily an apology for some of the worst actions recorded by history, besides being inconsistent with any law being enforced at all.

The 'one man company' is a sub-variety of the private company. Its distinguishing peculiarity—what has earned it its opprobrious nickname—is that it is or may be a device for defeating the creditors of the trader or of the company which is his incorporated counterpart. In *Salomon* v. *Salomon & Co.* there was no pretence for saying that the trader was insolvent at the time he transferred his business and assets to the company: but in *In re Hirth*, '99, 1 Q. B. 612, 68 L. J. Q. B. 287, C. A. this new element of insolvency was introduced into the situation, and it presented a piquant plat for the legal epicure. At first sight there was something taking in the view of Wright J., that though the trader's trustee in bankruptcy could prima facie claim to have the sale set aside, he could not do so after the rights of creditors of the company had intervened on a winding-up. Undeniably there are cases where the liquidator as representing creditors has been held to have

higher rights both of offence and defence than the company itself would have had: for instance, the liquidator may resist specific performance of a contract, though the company itself could not; but it is a very different thing to say that the liquidator, because he represents creditors, can make good a title which the legislature has declared defeasible. Given that the sale of the business to the company in *In re Hirth & Co.* was, as undoubtedly it was, a fraudulent assignment, it was then an act of bankruptcy, and being followed by an adjudication within three months the trustee's title related back to it, and divested the property from the company unless the transaction was a protected transaction within the Act, which there was no pretence for saying that it was. The doctrine of relation back may seem sometimes harsh, but it is founded on public policy, and the very object of such public policy is to strike at transactions like these—*mala fide* dispositions of property on the eve of bankruptcy in fraud of creditors.

How far is the person who makes a gratuitous loan of a chattel liable for damage caused to the borrower by some defect in the thing lent? This question is neatly raised in *Coughlin* v. *Gillison*, '99, 1 Q. B. 145, 68 L. J. Q. B. 147, C. A., and the answer given is in accordance with the best authorities, and with good sense. A person who, as a favour, lends a chattel to a friend, ought to communicate to the borrower any defects with reference to the use thereof of which the lender has knowledge, and if he omits to do so, he is liable for injury to the borrower resulting from these defects; but the lender's liability is strictly limited by his knowledge. A man who lends a horse or a carriage to a friend in no sense guarantees that the one or the other are free from defects.

A tradesman who advertises that his own goods are better than those of his neighbour and rival does nothing which is actionable even with special damage. This is the effect of *Hubbuck & Sons* v. *Wilkinson, Heywood & Clark*, '99, 1 Q. B. 86, 68 L. J. Q. B. 34, C. A. It is strange that a very competent judge should have supposed that such a puffing of a man's own goods as we have described could expose the puffer to an action.

A, the lessee of premises, assigned the term to *B*, who mortgaged the premises by a sub-lease to *X*. *X* entered into possession, and did not, whilst in possession, pay the rent due to the original landlord *N*. *A* was compelled to pay it. *Bonner* v. *Tottenham, &c. Building Society*, '99, 1 Q. B. 161, 68 L. J. Q. B. 114, C. A. decides that under these circumstances *A* could not maintain an action against *X* for

money paid, and that *Moule* v. *Garrett*, L. R. 5 Ex. 132, L. R. 7 Ex. 101, did not apply. The distinction appears to be that in order that *A*, a lessee, may recover from an assignee, *X*, rent which *A* is compelled to pay to the original landlord *N*, *A* and *X* must each be legally compellable to pay rent to *N*. In *Bonner* v. *Tottenham, &c. Building Society*, the sub-lessee, *X*, was under no obligation whatever to the original landlord.

Norton v. *Davison*, '99, 1 Q. B. 401, 68 L. J. Q. B. 265, C. A. follows *Walker* v. *Nussey* (1847) 16 M. & W. 302, and decides that when upon an oral contract for the supply of goods it was a part of the contract that a sum of money which had been overpaid to the seller upon a previous sale of goods by him to the purchaser should be retained by the seller on account of the price of the goods contracted to be supplied, there was not a part payment which would satisfy the Sale of Goods Act, 1893, s. 4, sub-s. 1. This decision may seem technical, but it is grounded on good sense. The statute allows 'payment'—the manifest act of payment—as one of the modes of proof that a contract above the specified value has been made; but the transaction which we have stated was not an act of payment at all, and was not such an act independent of the contract as to afford evidence anything like equivalent to a memorandum in writing. Indeed there was and could be no retainer, only an agreement for future retainer, before there was actual payment of the residue and acceptance of that payment as a discharge of the whole price. But though the judgment of the Court in *Norton* v. *Davison* is sound, the case and others like it provokes an inquiry often raised in these notes whether the archaic provisions of the Statute of Frauds, s. 17, had not better have been repealed rather than re-enacted by the Sale of Goods Act.

Shipway v. *Broadwood*, '99, 1 Q. B. 369, 68 L. J. Q. B. 360, C. A. may remind laymen of the often forgotten fact that in matters of trade the morality of the law is higher than the prevailing commercial morality of the day. The Courts unswervingly enforce the principle that no man shall be allowed to have an interest against his duty. *A* sells horses to *X*, who purchases them subject to the condition that their soundness shall be certified by *N*, a veterinary surgeon. To make sure of the sale *A* bribes *N* to give a favourable certificate. On this fact coming out the Queen's Bench Division hold that *A* cannot enforce the contract, and that it was immaterial to inquire whether the bribe did or did not affect *N*'s judgment. The fairness of this decision is obvious. Yet it may be doubted whether the principle on which it is founded governs the common practices of tradesmen.

X undertakes to supply coals to *A*, who relying upon the contract with *X* undertakes to deliver part of these goods to *N*. *X* in breach of his contract fails to deliver the goods to *A*. *A* therefore cannot perform his contract with *N*, who brings an action against *A*, claiming £150 damages. *X* when communicated with repudiates all liability, and refuses to take up the defence. *A* defends the action but pays £20 into Court, and proves that £20 is enough to satisfy *N*'s claim. *A* thereupon brings an action against *X*, and claims as damages the costs of defending the action against *N*. It has been held by the Court of Appeal that *A* is entitled to be compensated for the cost of the defence. This is the result of *Agius* v. *Great Western Colliery Company*, '99, 1 Q. B. 413, 68 L. J. Q. B. 312, C. A., which follows *Hammond & Co.* v. *Bussey* (1887) 20 Q. B. D. 79. It appears to be a fair and reasonable deduction from the rule laid down in *Hadley* v. *Baxendale* (1854) 9 Ex. 341; but it is impossible not to be struck with the fact that the rule as to damages laid down in that leading case raises more difficulties than it solves. The truth is that the celebrated rule is in substance sound, but that in the leading case it is badly expressed, and has needed a good number of explanatory glosses in order to make it workable. Is not the time come when the fundamental principle governing the assessment of damages might be judicially expressed in more accurate and clearer terms?

A fundamental principle of English law is that, subject to certain definite and statutable exceptions, 'crime is local,' and the only acts that are triable in England as crimes are acts done in England and criminal by the law of England.

This being the rule of law it is often difficult, not to say impossible, to punish here offences committed in a foreign country, even though that 'foreign' country be part of the British Empire, or even part of the United Kingdom. *X*, who carries on business in the county of Durham, obtains goods there from a traveller of *A*'s who carries on business in Glasgow, and obtains them by means of false representations made in Glasgow by *X* to *A*.

These are the facts briefly stated of *R.* v. *Ellis*, '99, 1 Q. B. 230, 68 L. J. Q. B. 103. *X* is put on trial at the Assizes in the county of Durham. The question is raised whether *X* has committed any offence in England, and whether therefore he is triable in the county of Durham. The Court for Crown Cases Reserved has held that *X* has under the Debtors Act, 1869, obtained goods under false pretences in England, and is therefore subject to the jurisdiction of the English Courts.

From a merely practical point of view this decision is satisfactory.

A cheat has defrauded an English tradesman, and he is not allowed to escape punishment by means of a defence which to most laymen sounds little better than a technical quibble. Yet if it be desirable that a rule of law, while it exists, should be respected and not be nullified by unreal refinements, the judgment of the Court in *R.* v. *Ellis* is open to grave criticism.

The only question which the Court was called upon to decide was whether *X* had, or had not, committed *in England* the specific offence of obtaining goods under false pretences. As a matter of common sense the answer would seem to be obvious. *X* committed part, but certainly not the whole, of the offence in England. But this answer, which involved *X*'s escape from punishment, was exactly the reply which the judges were unwilling to give, and the members of the Court for Crown Cases Reserved escaped from the difficulty in which they were placed by adopting one of two inconsistent logical devices.

The majority of the Court held that *X* committed an offence by 'obtaining the goods,' and that this offence was committed in England. This is apparently the view of the Lord Chief Justice, Wills J. and Hawkins J., and perhaps, though this is not quite clear, of Bruce J. But, with the highest respect for these eminent judges, their way of looking at the matter is on the face of it wrong. To obtain goods is not *per se* a crime. If it is a crime, it is a crime committed every day by every judge of the High Court; if moreover proof be wanted that the obtaining of goods is an innocent act, it is afforded by the fact that an indictment against *X* simply for 'obtaining goods in the county of Durham' would be bad upon the face of it. No subtlety can conceal from any accurate thinker that the false pretences are of the essence of the crime charged against *X*, and these false pretences were, on the view held by the majority of the Court, made not in England, but in a foreign country, viz. Scotland. The offence charged, in other words, was not committed, and therefore was not triable, in the county of Durham.

Mr. Justice Wright, with characteristic acuteness, arrives at the same practical result as his colleagues, but by a totally different and very ingenious process of reasoning. The representation made in Glasgow may, he conceives, be looked upon as continuing in England, and therefore the goods may be treated as obtained under false pretences made in England. If the judgment of the Court is sound it must, we conceive, be defended either on the ground of precedents themselves open to some question, or on the ground put forward by Mr. Justice Wright. But his lordship's view, though ingenious, is too subtle. The pretences made at Glasgow produced

their effect in England. This may be granted, but this concession falls very short of proof that an act, viz. the utterance of particular words, which takes place in Scotland, in reality takes place in England. [We agree with our learned contributor's criticism of the first reason for upholding the conviction, but as to the second we think Mr. Justice Wright's opinion correct. It is too late to complain of the law of larceny and allied offences for being subtle.—ED.]

The considerations which induced the Court to sacrifice a good deal of logical consistency for the sake of convicting the defendant in *R.* v. *Ellis* may easily be understood from the following question with which Mr. Justice Hawkins has concluded his judgment. 'Would it not be revolting to good sense if it could be truly said that the law in this commercial country was such that the defendant could avert the consequences of his crime by alleging that, though he had beyond all question obtained the goods by fraudulently false pretences, he could not be punished because his false pretences were made in Glasgow?' The argument implied in the question is best answered by two others. Is not the principle that crime is local obsolete? But is it not revolting to good sense that in this law-respecting country the judges, in order to escape from the effect of a legal rule which ought to be abolished or modified by Parliament, should try to convince themselves that an offence was committed in the county of Durham, which was in fact committed, partly at least, in Glasgow?

The sixteenth-century sages of the law were fond of pointing out how many more doubts arose on the language of statutes than on points of pure common law. Their comments continue to be justified by the modern state of the reports. Take, for example, the cases reported in the Queen's Bench Division for the first month in this quarter. They number twenty-seven. Of these not more than five could be decided without reference to the statute book. We ought, perhaps, in strictness, to say not more than four, for *R.* v. *Rhodes*, '99, 1 Q. B. 77, 68 L. J. Q. B. 83, though it refers to the common law offence of obtaining goods under false pretences, involves the consideration of the Criminal Evidence Act, 1898. Judging therefore by the cases in the Queen's Bench Division for January, we may say that not much more than one-seventh of the cases decided by the judges turn wholly upon the rules of the common law. This is partly due to the multiplication of statutes; partly also, we may hope, to the common law being well settled on most matters of everyday business.

The mere extension of the statute law may seem in itself to be a matter of comparative indifference, for many parliamentary enactments are simply the restatement of some common law principle, but enthusiasts who expect great advantages to the public from codification must face two facts.

The one is that the expression of a rule in a definite written form does not of itself preclude disputes as to its meaning. The fourth and the seventeenth sections of the Statute of Frauds have, we may be pretty sure, given rise to more cases, in other words, to more discussion as to the meaning of these two enactments, than have any two well-known rules of common law or of equity.

The second fact is that English judges have contracted the habit of construing the provisions of an Act of Parliament in a much narrower spirit than the spirit in which they construe legal principles which are not embodied in a statute; in construing a statute the Courts look to its words; in applying a principle of law they look to its meaning. This difference in the method of interpretation may be inevitable, yet if its existence be granted the objection felt by many English and by almost all American lawyers to schemes for codifying the common law are felt to be more reasonable than they at first sight appear. Lawyers fear to exchange principles construed according to their spirit for enactments construed according to their letter. However, nobody in this country wants to codify the common law all at once. And the partial codification of well settled law which has already taken place has not been found to raise new doubts or increase litigation.

Are the public aware that Parliamentary legislation is year by year increasing the number of legal duties imposed upon individuals? No one can, without breaking the law, expose goods for sale on the carriage way, and he who commits this offence may come within the scope of more than one Act imposing separate penalties (*Wandsworth Board of Works* v. *Pretty*, '99, 1 Q. B. 1, 68 L. J. Q. B. 193). Under one of the earlier Salmon Fishery Acts any person commits a crime who has 'in his possession any unclean or unseasonable salmon, or any part thereof' (*Morris* v. *Duncan*, '99, 1 Q. B. 4, 68 L. J. Q. B. 49). Various and numerous are the offences which are created, many, in other words, are the duties imposed upon us all by the Licensing Acts, and so difficult has it become to keep within the path of legality that the House of Commons itself has gone very near breaking a law imposed by Parliament (*Williamson* v. *Norris*, '99, 1 Q. B. 7, 68 L. J. Q. B. 31). How immensely the duties and liabilities of employers have been increased by the Workmen's Compensation Act, 1897, is proved by

a whole line of cases such as *Woodham* v. *Atlantic Transport Company*, '99, 1 Q. B. 15, 68 L. J. Q. B. 17, C. A.; *Billings* v. *Holloway*, '99, 1 Q. B. 70, 68 L. J. Q. B. 16, C. A.; *Smith* v. *Lancashire and Yorkshire Railway Company*, '99, 1 Q. B. 141, 68 L. J. Q. B. 51, C. A.; *Powell* v. *Brown*, '99, 1 Q. B. 157, 68 L. J. Q. B. 151, C. A.; *Lowe* v. *Pearson*, '99, 1 Q. B. 261, 68 L. J. Q. B. 122, C. A. Nor is there the least reason to suppose that this new line of cases is one of which it is possible to predict the length. Manufacturers who think they are at liberty to pollute a flowing stream with matter discharged from their factories may be warned by the *River Ribble Joint Committee* v. *Halliwell*, '99, 1 Q. B. 27, 68 L. J. Q. B. 20, that they go very near a breach of the law, and shipowners will find that their duties to seamen discharged abroad are considerably increased by the interpretation which the Courts have put on the Merchant Shipping Act, 1894, s. 186 (*Purves* v. *Straits of Dover Steamship Company*, '99, 1 Q. B. 38, 68 L. J. Q. B. 38).

Now this tendency to increase the legal duties of private citizens may or may not be politic. One fact, however, is indisputable, though it is often, if not disputed, certainly ignored; every increase in the legal duties imposed by law upon individuals means a diminution of individual freedom. Sentiment and fashion all run in favour of State intervention; in other words public opinion is opposed to the protection of personal freedom.

Parker v. *Alder*, '99, 1 Q. B. 20, 68 L. J. Q. B. 7 marks the very extreme limit to which the law can wisely go in extending the duties of individuals, for it shows that under an Act of Parliament a man may be made guilty of an offence which might well be called a disgraceful crime without incurring any moral guilt. A farmer undertakes to deliver pure milk to a customer in London. He delivers the milk in a perfectly pure condition to a railway company, but before the milk reaches the customer, it has, without any fault on the part of the seller, been adulterated. The seller has then committed an offence within the Sale of Foods and Drugs Act, 1875, and is liable to a penalty. He is, in short, made legally responsible for an act for which he is in no wise morally responsible, since he had no means of preventing the act being done. This is surely rather a serious state of things. The maxim *mens rea facit reum* has in it much good sense. Teach men that acts which are morally innocent are crimes, and they will soon draw the inference that crimes are not moral offences.

The Lord Chief Justice treats the judgment of the Court in *Parker* v. *Alder* as a deduction from the principle that a master is respon-

sible for the unauthorized acts of his servant. 'It has been decided in *Brown* v. *Foot*, 66 L. T. 649, . . . that an innocent vendor of milk is undoubtedly liable for the unauthorized act of his servant in adulterating it. It becomes therefore *at once apparent that there is really no material difference between this case and that, because a vendor is no more able to prevent the adulteration by a dishonest servant than he is to prevent adulteration by strangers such as the servants of the railway company*' ('99, 1 Q. B. p. 25).

The words underlined contain a fallacy. A master cannot prevent his servant from adulterating milk in a given instance, but he may dismiss a servant guilty of adulteration, and therefore there is at any rate some rough justice in treating the act of the servant as the act of the master. But a farmer who employs a railway company to carry his goods cannot dismiss the servant or the stranger who adulterates it; he does not even know who is the person deserving dismissal. But there is a further point to be considered which seems to have escaped the attention of the Queen's Bench Division. The rule that an employer is to be held liable for unauthorized, or even for forbidden, acts done by his servants is in itself a deviation from the principles of strict justice, though a deviation justifiable by considerations of obvious expediency, and it is a very serious thing to extend the limits of an anomalous rule. It is well that exceptions to general principles should always be treated as exceptional. The judgment in *Parker* v. *Alder* may be justifiable on grounds of expediency, but the Court which pronounced it would have done well to acknowledge that it involved a perilous extension of an exceptional rule justifiable only on the ground of its obvious utility.

[This and the two preceding notes, all from a very learned contributor, represent only his own opinions. We think it more respectful to him to let them stand with this warning than to modify them into something which we could just pass as editorial.]

'An action for malicious prosecution will lie against a corporation.' This is decided—contrary to a considerable body of earlier though luckily not authoritative opinion, including Lord Bramwell's—by *Cornford* v. *Carlton Bank, Lim.* ('99, 1 Q. B. 392, 68 L. J. Q. B. 196). It is rather hard for us to realize the difficulties of former generations on such a point. There is an obvious logical difficulty in attributing intention, motive, malice, or, in short, any kind of human feeling to a fictitious being created by law. But there is no greater anomaly in attributing malice to a corporation than in attributing to it any other human sentiment. If therefore a corporation cannot entertain malice, so neither can it have a remedy against any course

of actions which involves deceit, defamation, or any kind of injury to the feelings or reputation of the corporation, which would be absurd. The sum of the matter is that if the law deals, as it must, with artificial persons, the fiction of their personality must be carried, notwithstanding any logical puzzles, as far as convenience and justice may require.

On the dissolution of a corporation what becomes of its choses in action?

This is the curious question raised, though not as yet finally decided, by *In re Higginson & Dean* ('99, 1 Q. B. 325, 68 L. J. Q. B. 198). In 1847 a trading firm became bankrupt, and a corporation, the Royal Bank of Liverpool, created by statute, proved in bankruptcy with other creditors. In 1887 the bank was dissolved by an order of the Court under the Companies Acts. At a later date it was discovered that the bankrupt firm was entitled to certain railway shares of considerable value. The official receiver recovered the value of the shares amounting to £6,500, and held the proceeds as trustee in bankruptcy. Another creditor moved to expunge the proof of the dissolved corporation, and claimed that the money to which the corporation had been entitled as creditor was divisible among the still existing creditors. The County Court judge expunged the proof. The Attorney-General appealed on behalf of the Crown. The judgment of the Queen's Bench Division, reversing the order of the County Court judge, has held that on the dissolution of the corporation the proceeds of the shares in the hands of the official receiver had passed to the Crown as *bona vacantia*, and the Crown was entitled to the amount.

None but a very daring critic would venture to lay down that the decision of the judgment of the Court given *In re Higginson & Dean* is wrong, and hesitation is the more necessary because the practical result of the judgment is apparently fair, for we may presume that in some form or other the *bona vacantia* which have fallen to the Crown will be distributed among the members of the dissolved corporation or their representatives. Still from a merely speculative point of view the decision of the Court is open to some criticism, and the language of the judgment delivered by Wright J. suggests that the Court, while satisfied with the conclusion reached, were not perfectly clear as to what was the line of reasoning by which it was best arrived at. A chose in action is after all nothing but a claim by *A* against *B* to be paid a certain or uncertain sum of money. *A* ceases to exist and leaves no representative. How then can the claim of *A* have any existence?

But the very idea of *bona vacantia* involves the existence of the

goods to which no one but the Crown has a right. If then the 'goods' being choses in action do not exist, how can the Crown have a right to the non-existent? The Court met this point by saying that the defunct corporation's interest in the railway shares in question was not a mere chose in action but an equitable interest in existing property.

The matter may also be looked at in a somewhat more practical way. The dissolved corporation was merely a legal name for the members of whom it consisted. The debts due to the corporation were therefore in substance, though not in form, debts due to these members. On the corporation being dissolved these debts may be considered to be in reality and in conscience the property of the persons who then constituted the corporation. But this natural justice cannot be expressed in any known terms of law or equity, and can be realized only as a matter of grace by the action of the Crown. This is a curious result, and might call for amendment if the case were likely to be common.

The doctrine laid down by the Lord Chief Justice in *Blackmore* v. *White*, '99, 1 Q. B. 293, 68 L. J. Q. B. 180, that an action founded on an implied contract lies against a copyhold tenant for omission to repair tenements repairable by the custom, is probably convenient, but it may be doubted whether the 'sages of the law' would have approved it. The Lord Chief Justice asks, 'If an action will lie for a fine, why should it not equally lie for damages for neglect by the tenant of his duty to repair?' It is submitted that debt lies for a fine because the fine is a certain sum due, and not because of any promise express or implied, for the action of debt has nothing to do with promise; and that if *indebitatus assumpsit* also lies, it is because of the pre-existing cause of action in debt, the promise to pay the debt being a mere fiction of pleading. It does not follow that *assumpsit* lies for unliquidated damages arising from the breach of a merely customary duty. The distinction does not seem to have been pointed out in argument. See Langdell's Summary, §§ 90 sqq. What made it necessary to decide the precise question was that the action was brought against executors.

A bicycle is not ordinary luggage which the railway companies are bound, if it is below a certain weight, to let a passenger carry with him free of charge (*Britten* v. *Great Northern Railway Company*, '99, 1 Q. B. 243, 68 L. J. Q. B. 75). The oddity of the thing is that any doubt should have been entertained upon the matter. A bicycle is no more ordinary luggage than is a pony or a carriage. French railway companies also distinguish between bicycles and ordinary

luggage, but, with surprising liberality, in the passenger's favour, charging a mere nominal booking-fee for any distance. As far as our information and observation go, the machines are more carefully handled than is the rule in England. But it must be remembered, in fairness to our companies, that their difficulties are much increased by the volume of other traffic. *Quaere*, in this connexion, whether oil in a lamp attached to a bicycle is a dangerous thing which the owner is bound to keep in at his peril when he puts the machine in a train with others. Once we found our front tyre, after a short railway journey, covered with oil from someone else's lamp. On a long journey the effects might have been serious.

X & Co. contract to load on board *A*'s ship a full and complete cargo at a certain rate of freight per ton on the quantity to be delivered to the consignees. The freight is to be due and paid, 'two-thirds in cash after sailing, ship lost or not lost, the balance on unloading and right delivery of the cargo.' After *X & Co.* have loaded part of the cargo, the goods so loaded are destroyed by fire. *X & Co.* afterwards load the remainder of the cargo and the ship sails. *A* claims payment of freight on two-thirds of the full cargo shipped, including the part destroyed by fire. *A* is not entitled to advance freight on this part of the cargo. This is the point decided by *Weir & Co.* v. *Girvin & Co.*, '99, 1 Q. B. 193, 68 L. J. Q. B. 170. Nor, in spite of the elaborate argument which seems to have taken place, is it easy to doubt that the decision of the Court is right. Freight is a payment to be made for carriage and delivery, and the peculiar provisions of the charter-party as to the mode of payment do not entitle the shipowner to freight for goods which have never been carried or delivered.

Beaufort Palmer's Act has already justified its existence, judging by the number of applications for relief made under it. The Court has been liberal in granting such relief, but it has very properly not allowed the Act to be used to bolster up negligence or screen fraud (in *Re Roxburghe Press, Limited*, '99, 1 Ch. 210, 68 L. J. Ch. 111). Its useful career seems likely however to be cut short, for the new Companies Bill repeals s. 25, and with its repeal vanishes the necessity for relief. It is a striking instance of legislative caprice, of the tentativeness of our experimental methods, that this section —the cash payment section—after being deliberately adopted by the legislature, should a few years afterwards be brought to the bar of the House to be repealed. It is to be hoped that the legislature will pause before taking this step. For the grounds

of public policy on which it was passed have not changed in the least, and if it is repealed the mischief at which it was aimed is certain to revive—that is to say the practice of paying for shares in things like furniture, plate, cigars, or, worse still, 'services' without any certain criterion of value. This is bad enough for the shareholders, but it is still more hard on creditors of the company, because it tends to make the limited capital—the only fund available to them—illusory and a sham. When the legislature sanctioned limited liability, it was under a moral obligation to see that the limited capital was a reality, and this obligation it recognized in s. 25. What reason is there—more especially since Beaufort Palmer's Act now redresses all legitimate grievances under the section—for abandoning the public once more to the arts of the unscrupulous promoter?

Wauton v. *Coppard* ('99, 1 Ch. 92, 68 L. J. Ch. 8), though it lays down no new law, furnishes food for reflection on several points. First, it illustrates how rash auctioneers often are—in their anxiety to conclude bargains—in making statements, committing themselves, for instance, to assertions as to the effect of covenants—covenants the construction of which at times taxes all the wisdom of an omniscient Court of Appeal. It is consoling from this point of view to find—and this is point number 2—that when auctioneers do hazard assertions of this kind, they cannot evade responsibility for them by saying that the statement was matter of law and not of fact. It is, like heirship, matter of fact, depending on principles of law. What the auctioneer pledges himself to is the result. Nobody asks or wants his opinion on the point of law. Thirdly, in spite of Gray's sentimentalizing about 'the sprightly race,' &c., we have the judicial dictum that a boys' school involves, if not an offensive, at least a disagreeable noise or nuisance. Stoke Poges was at a safe poetic distance from the playing fields of Eton.

Finally *Wauton* v. *Coppard* is a fresh reminder that covenants must be taken to mean what they say, and are not to be restricted by artificial rules of construction like the *ejusdem generis* rule.

Our law, whatever its shortcomings in respect of scientific system and theoretic completeness, has the merit of keeping close to facts. Its attitude towards infants is an example of this. Mental capacity is a thing of gradual development, from its dawn in childhood to its meridian in middle age. Contract taxes it, or may tax it, to its fullest extent. Experience, judgment, delibera-

tion, all the mind's maturest powers, may be called upon where a person is committing himself to a contract, and the law knowing this does not invest an infant with the capacity to contract except for things which the infant must have—the necessaries of life. Torts, however, are quite a different matter. 'I should like to see the man bold enough to affirm,' said Knight Bruce L.J., 'that any young lady of seventeen is not *doli capax*.' The male infant has proved his capacity on many occasions and in a variety of ways. In *Woolf* v. *Woolf* ('99, 1 Ch. 343, 68 L. J. Ch. 82) it took the form of passing off his goods as those of a well-known firm of tailors; but the Court, while awarding a perpetual injunction against him, hesitated—with that scrupulous nicety which distinguishes our dispensers of equity—to follow up the injunction by ordering the infant to pay costs. In the end it did, and fraudulent and tortious infants must now accept—as principle demands they should—the full consequences of their acts and defaults. 'It is pretty to observe,' as Mr. Pepys would say, how shy our precedent-bound English judges are in doing a thing if no judge has ever done it before.

The law of England does its best to mitigate the lot of the unhappy lunatic, and prefers that his creditors should go unpaid rather than the lunatic should suffer privation of personal comforts. But if a pauper lunatic has been maintained by the guardians for over thirty years at the expense of the rates, and at last comes in for a substantial legacy, there is no reason why the union should not be indemnified, seeing that the maintenance is a debt in law—so Chitty J. decided in *In re Newbegin*—and recoverable as such. But what if the union, unendowed with any gift of prophecy, has done nothing to assert its claim until the legacy turned up? Can it then claim more than six years' past maintenance from the *estate of the deceased lunatic?* The italicized words are material, because on the lunatic's death the paternal jurisdiction in lunacy with its powers of equitable administration is at an end, and the claim has to be fought out as a legal duel between union and creditor with all the rigour of the game. Yet even then to apply the Statute of Limitations strictly, as was done in *In re Watson, Stamford Union* v. *Bartlett*, '99, 1 Ch. 72, 68 L. J. Ch. 21, seems a hardship on the union, because the foundation of the statute is laches, and what laches is imputable to a union, as Wood V.-C. pointed out in *Stedman* v. *Hart* (Kay, 607), for not bringing a futile action against a pauper lunatic? Such an action would, it is obvious, be stayed by the Judge in Lunacy as vexatious; if it went on it would only mean money thrown away in costs. It will be interesting to

know what unions will do in the future to prevent the statute running against them in these cases of pauper lunatics unexpectedly enriched. Perhaps some insurance office will be got to take the risk—if the premium is a calculable quantity.

The reasons in favour of allowing a prisoner to give evidence on his own behalf were, in our judgment, on the whole of more weight than the very forcible arguments produced against a serious change in the criminal law. But no impartial critic ever doubted that the operation of the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36) needed to be carefully watched. *R.* v. *Rhodes*, '99, 1 Q. B. 77, 68 L. J. Q. B. 83, and *R.* v. *Gardner*, '99, 1 Q. B. 150, 68 L. J. Q. B. 42, show what it was easy enough to foresee, that the admission of a prisoner's evidence does to a certain extent change his position and by no means wholly for the benefit of the accused. As a witness, or a possible witness, he cannot enjoy all the immunities of a prisoner on his trial. When he gives evidence he gives a right to the counsel for the prosecution to sum up the case for the Crown and comment upon the evidence of the prisoner (*R.* v. *Gardner*). If he does not tender his own evidence he gives the Court (though not counsel) a right to comment on his failure to give evidence.

That the Criminal Evidence Act, 1898, may be very far from a benefit to a prisoner guilty of the offence with which he is charged is not a decisive argument against the policy of the Act, for it is fairly maintainable that the law has hitherto given a guilty man too many chances of escaping punishment, and this at the cost of occasionally exposing an innocent man to unjust conviction. That the admission of an accused person's evidence has a tendency to make the attitude of a judge less favourable than it has hitherto been towards a prisoner is, we take it, true, and is a valid argument, as far as it goes, against allowing a person charged with crime to be a witness. The conclusion which sensible observers would probably draw is that the possible tendency of the recent Act to turn a judge into a prosecutor or a cross-examiner must be carefully checked, and that the result of the Act for good or bad depends entirely upon the way in which it is worked by the Courts. Two things are perfectly clear. There ought to be absolute agreement among the judges, arrived at after careful consultation, as to the way in which many questions which of necessity are left open by the Act ought to be answered. The Act, in the next place, ought on every doubtful point to be construed in favour of the prisoner, and as far as possible in accordance with the spirit at any

rate of the practice existing before the Act came into operation. Thus it must be a matter of the gravest doubt whether, unless under the most exceptional circumstances, a prisoner giving evidence on his own behalf should be held liable to prosecution for perjury. Technically this liability seems indisputable. But the enforcement of such liability must be, except under the strangest circumstances, an infringement upon the protection which the law has hitherto given to a prisoner upon his trial. If the prisoner is convicted of the principal offence, it is harsh to punish him for perjury besides. The failure of his attempt to deceive justice is warning enough. If, on the other hand, he is acquitted, a subsequent prosecution for perjury is an indirect method of obtaining a new trial for the first offence, contrary to the immemorial practice of our law. One possible result of the Act may be the total abolition of the witness-oath in England. We should see it with more than equanimity. We say nothing of Scotland, where the form of administering an oath is decent and dignified.

The attention of our readers ought to be specially directed to the remarkable article by Professor Langdell in the February number of the Harvard Law Review on the status of the new territories acquired by the United States. On all matters of law, and especially of American law, he writes with authority. The conclusion he draws from an elaborate study of the American constitution is in effect that the constitution applies to the States of the Union, and, speaking broadly, to the States alone. From this conclusion it results that there exists, as far as the constitution is concerned, nothing to prevent the United States from holding territories which do not form part of the Union and governing them as dependencies, after the manner, for example, in which the United Kingdom governs India. When we consider the extent to which political problems take in the United States the form of constitutional questions, the enunciation of Professor Langdell's constitutional doctrine is an event of political importance. The weight of his conclusions is increased by the consideration that he is a consummate lawyer, but has never been numbered among political partisans.

To prove that the United States can, without any infraction of the constitution, hold and govern dependencies, does not, it is obvious, go one step towards answering the question whether it be or be not expedient for the American Republic to extend her power over distant and foreign territories. There are many things which are lawful which are not expedient; and it may further be doubted

whether Professor Langdell has, even as a matter of constitutional law, given quite enough consideration to the doctrine of the common law that allegiance is territorial. Every man born in territories subject to the British Crown is *ipso facto* a natural born British subject, and has in England, whether he be white or black, all the rights civil and political of an Englishman. It has quite recently been decided by the Supreme Court that the common law doctrine applies to the United States (*The United States* v. *Wong Kim Ark*, 169 U. S. 649). It may be argued that when once the United States become sovereign, say of the Philippines or of Cuba, persons there born become citizens of the United States. Whether this be so or not is a question certain to be raised before American Courts. Prof. Thayer, in the March number of the same Review, seems to think that the rule applies only to such dependencies as may be formally made 'Territories' by Act of Congress. At all events this point does not affect the power of regulating local government within the dependency.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

LORD HERSCHELL.

A REMINISCENCE.

IN Lord Herschell the profession of the law has lost one of its greatest members, his party a powerful advocate and wise counsellor, and his country a most trusty, able, and conscientious servant. Born as he was upon the old *Cras Animarum*, the new year's day of the legal year, he seemed predestined by fate, as he was by intelligence, industry, and foresight, to rise to the summit which he so early reached. The first time I ever saw him he was sitting, in December, 1860, in a new wig and gown at the Liverpool sessions, which he had that day joined, having been called in the preceding November. I had myself joined in the preceding spring, and I made friends with the new-comer—a friendship which lasted as long as his life. I have heard it sometimes said that Lord Herschell owed his early start at the Bar to good luck and to the interest and help of influential friends. This is not so. While he undoubtedly made the best use of every chance which came in his way, his chances were of his own making, and he was, from the beginning to the end, so far as it can be truly said of any man, the architect of his own fortunes. The secret of his success may be summed up in the lines of Juvenal:—

> 'Nullum numen habes, si sit prudentia; nos te
> Nos facimus, Fortuna, deam caeloque locamus.'

In the first three or four years he hardly seemed to be moving, but his reputation as an able lawyer and advocate was growing in those early days much more rapidly than his income. Edward James and Quain, the leading silk and junior of the Northern Circuit, had perceived his merits, and both, especially the former, often relied upon him to read and note a brief or to draft an opinion, and not a few judges before whom he had done some piece of work for a friend already looked upon him as a coming man. At Newcastle and Durham and Liverpool he occasionally defended prisoners with extraordinary ability and success. I remember too a notable defence at that time at the Carlisle assizes which brought him great credit. A woman was charged before Baron Bramwell for the murder of her illegitimate child, two or three years old, by drowning it in the Eden. She had been in

difficulties about paying for the boarding out of the child, and had called for it and taken it to a secluded spot on the banks of the river, and the child's body had subsequently been found in the water. There was other evidence which seemed to make out on the depositions an almost irresistible case. The judge had asked Herschell to defend the prisoner, and a lady sitting on the bench sent a message to him that she wished to see him. On his return from the interview he told me that she lived in the parish from which the prisoner came, and had informed him that there was some evidence of insanity in the prisoner's family and of peculiar conduct on her part. 'But,' said he, 'I told her that the evidence was not sufficient to promise an acquittal, especially before such a judge as Bramwell, and that if such a defence was set up and failed the prisoner would certainly be hanged, and therefore strong as the case for the prosecution was I had made up my mind that the best chance was to fight it on the merits.' And fight it he did, with remarkable ability and complete success. I well remember the generous but well-deserved compliment with which Baron Bramwell began his summing up. 'Gentlemen,' he said, 'there is one aspect of this trial which makes me proud of the profession to which I belong. The prisoner at the bar has not apparently a friend or a shilling in the world, but no wealth or position could possibly have bought for her a more able, more eloquent, or more zealous defence than that which has been made on her behalf.'

By means of displays of this kind and of the reputation which he had acquired with the leaders of the circuit, he began at the end of some four or five years—during part of which he and I reported the Queen's Bench cases for a weekly publication called the New Reports—to build up a practice for himself, and from about 1867 until he took silk in 1872 he was making a considerable, though not a very large income. It is some indication of the reputation which he had earned that every judge upon the bench backed his application for the silk gown which he obtained when he was thirty-four years of age, and of eleven years' standing at the Bar. His success in the front row was rapid and unbroken both on circuit and in London. In 1873 the borough of Carlisle becoming once more a quarter sessions borough—(James Boswell of Auchinleck had been one of its last Recorders)—he was appointed Recorder, and retained that office until he was made Solicitor-General. He had in 1868 been engaged in some election petitions in Lancashire, and after the General Election of 1874 he was retained for the Liberal sitting members for the City of Durham, and also for the petitioners against a candidate returned in a neighbouring county division. The borough petition came on first, and the members

were unseated. Mr. Herschell and Sir Arthur Moncк were requested to become the new Liberal candidates, and accepted the invitation. He therefore remained at Durham for another fortnight or so, fighting the county petition by day and carrying on the election contest by night, and at the end of that time returned to London member for Durham, and with his election expenses more than covered by the fees which he had earned during the contest.

From his first entry into Parliament he made his mark there, and acquired the confidence of many members on either side of the House, who frequently sought and relied on his judgment, especially in those matters in which a combined knowledge of law and commerce was valuable. In February, 1876, there was a full-dress debate on the action of the Government in issuing to naval officers certain instructions as to the treatment of fugitive slaves, and the whips arranged that Mr. Herschell should move the adjournment of the debate at the end of the first night—an opportunity which he was very pleased to take, and of which he made good use on the following day. I remember sitting in the gallery to hear him. He spoke with clearness and confidence, using no notes. Indeed, relying on an excellent memory, and his power of thinking and arranging his ideas with perfect coolness whilst he was on his legs, he hardly ever used a note either at the Bar, or on the platform, or when speaking in Parliament; and I have often heard him open most complicated cases without a note and without referring to his papers. When Mr. Gladstone came into office in 1880 it was generally supposed that Mr. Watkin Williams would be offered the Solicitor-Generalship, but the choice of the Premier fell upon Herschell, who became Solicitor-General, under Sir Henry James as Attorney-General—a comrade with whom he worked for five years with the greatest cordiality, and with an esteem which was I know fully reciprocated by his senior. On one occasion, when Herschell was referring in conversation to his then recent refusal of a piece of promotion, he repeated with pardonable pride how Mr. Gladstone had told him that he was pleased and relieved by his refusal; that the position of the law officers in the House of Commons had since 1880 become much more important and laborious than it had ever been before, and that he could confidently say that no law officers had ever before been called upon to make such sacrifices and take such an active part in the proceedings of Parliament as his then Attorney-General and Solicitor-General. And here I may observe that (with the exception of Lord James of Hereford) no man in modern times ever refused so many offers of promotion to high places as did Lord Herschell. Lord Cairns about the year 1877—I cannot now

fix the precise date—offered him a judgeship, and between 1880 and 1885 he refused a Lord Justiceship, the Mastership of the Rolls, and the Speakership. He showed me the letter in which Mr. Gladstone offered him the Lord Justiceship, and gave me an account, immediately after it took place, of the conversation in which the same minister had invited him to be nominated for the Speakership, and I remember that nothing could have been more friendly or flattering than the language of the offer on each occasion. I am not repeating any cabinet secret when I add that he might, five years ago, have been Viceroy of India, had he been prepared to make the sacrifice which such a break in his domestic, social, and public life would have involved. It will be remembered that in 1885 Durham was deprived of one of its members, and Sir Farrer Herschell, being the junior member, crossed over to Lancashire and stood for the new constituency of the Lonsdale Division, which was supposed to offer a fairly safe Liberal seat. He was however defeated by a considerable majority, and never sat in the short Parliament of 1885–6. One morning in February, 1886, he sent a message to me in the Courts that he would like to see me when the case in which he was engaged was over. When judgment had been given against him, he said to me as we walked away together, 'That decision is wrong, but I shall never have the chance of proving it. I have argued my last case. I have accepted the Chancellorship.' Six months later he was an ex-Chancellor, but he had filled the office long enough to show his fitness for great employment, and during the next six years he worked on with undiminished zeal in the judicial sittings of the House of Lords and the Privy Council, in the Standing Committee of the House of Lords, where he did a great deal of unobtrusive but extremely important non-political work, as Chairman of the Royal Commission on Indian currency, and (somewhat later) of that on Vaccination. He spent much valuable time too in looking after the interests of the London University, of which he was made Chancellor in 1893, and in the endeavour to infuse life into that rather anæmic body, the Imperial Institute. In addition to all this he found leisure to attend to many useful and charitable institutions, with some of which he had been connected for many years, and to indulge in his two favourite recreations—music and foreign travel. To the last he always kept up his violoncello-playing, and loved to go wherever the best music could be heard.

His second Chancellorship is so recent that it is unnecessary to refer to its public history. Perhaps the most harassing incident of it was the agitation which took place in 1893 against the mode in which the Lord-lieutenants exercised their function of recom-

mending names for the magistracy. It involved him in a huge correspondence, and in a vast number of investigations into the value of recommendations, many of which, though well-intentioned, were certainly ill-considered. Conscientiously, and at the cost of great labour, he did his best to secure fair play on the one hand, and the proper administration of justice on the other. If ever his work could be said to have tried him, it was at that time.

In June, 1895, he found himself for the second time an ex-Chancellor at fifty-seven years of age, as vigorous as ever in mind and body, and with an apparently extended prospect before him of future labours and future ambitions. In 1897 he was appointed, with Lord Justice Collins, a member of the Venezuela Boundary Tribunal, upon which he looked forward to sitting in May next in Paris, and in which his vacant chair will now be worthily filled by his old comrade and rival on the northern circuit, Lord Russell of Killowen. Last July, as we all know, he crossed the Atlantic to take his place on the Commission appointed to deal with certain tariff and boundary controversies existing between Great Britain and Canada on the one side, and the United States upon the other. In the last interview I had with him he expressed his pleasure at his selection for so important and interesting a duty, and at the flattering terms in which the invitation had been conveyed to him, especially at the suggestion that he was a *persona gratissima* to the American nation. He left in high spirits and excellent health, and but for the unfortunate fall which seems to have been the primary cause of his death, he might well have looked forward to many years of useful and dignified life. *Dîs aliter visum est:* yet, if his friends mourn the loss involved in his premature death, they have at least the satisfaction of contemplating with pride the splendid work that he accomplished during the span of life which was allotted to him.

W. C. Gully.

LORD JUSTICE CHITTY.

NO event, perhaps, touching our profession within the memory of the oldest member of the Bar ever cast so deep a shadow for the time, or awoke so keen a sense of personal loss, as the death of Lord Justice Chitty. On Friday he was sitting with his colleagues in the Court of Appeal apparently full of life and pursuing with eager interest, as he always did, every detail of the case before him. On the Wednesday following the chapel bell was tolling for his departure. The summons was striking enough to arrest the attention of the most thoughtless. But it was not so much the suddenness of the blow that everybody was thinking of then, as the sterling worth and winning personality of the man who had passed away. In a very remarkable degree he possessed that strange power of attraction given to but few which can turn a casual acquaintance offhand as it were into a friend.

Nothing could have been more touching or more true than the few words spoken by the Lord Chancellor on the next morning at the sitting of the Court. Nothing could have been more expressive of universal respect than the crowd of mourners thronging the chapel on the following Saturday. In the case of the late Lord Justice the accustomed farewell honours have been ungrudging and complete. But still an old friend may be forgiven if he attempts to pay a brief tribute to his memory in the columns of this REVIEW.

It is now nearly fifty years since the writer first made the acquaintance of Joe Chitty. He was then at the height of his Oxford reputation. The best amateur wicket-keeper in England, the finest oar on the river, a scholar of no mean order, frank and open in disposition, bright in manner, and the hero of many boyish tales of pluck and endurance, some quaint and grotesque but all the more fascinating on that account, he was admired and almost adored by his contemporaries at the University. And with it all he was not one bit spoiled. He was just as simple and unaffected as if he had been an absolutely undistinguished item in the crowd. And so he remained to the end of his life—simple and unaffected throughout. All through his career he was perfectly consistent. And that was what his friends valued in him most. You could always depend upon him. As he was on the river so he was at the Bar. There never was on the river or at the Bar a more loyal comrade or a fairer or more generous opponent.

He had too, I think, the sweetest temper of any man I ever came across. Nothing ever put him out. Even in the throng and press and worry of his work as leader at the Rolls before Sir George Jessel, he was never irritable or impatient. There was always a pleasant word for his junior and a cheery answer for his antagonist.

It may be that, as judge of first instance, he did not quite fulfil the expectations which his friends had formed of him. But there is an incident of his career during that time which I should like to recall. It so happened that the writer was standing below the bar of the House of Commons waiting listlessly for the result of a tedious division. There came up the leader of the Northern Circuit. 'I have just returned from circuit,' he said; 'your friend Chitty has done his work admirably. It could not have been done better. It was most admirable. I could not have believed that an Equity judge could have tried Nisi Prius as if he had been brought up to it. And he has such a knowledge of Common Law. And, do you know,' he added with a smile, 'I got into a slight collision with him one day at Liverpool. It was quite my fault. He behaved with perfect temper and dignity. I was wrong and he was right; and I tried to tell him so. But then he stopped me at once before I could say what I wanted.' It may seem a trivial story, but it was a great pleasure to hear it at the time. And the hearer may be pardoned for doubting to this day whether it was more creditable to the strength and character of the judge, or to the generosity of the very great, but perhaps somewhat masterful, advocate who is now Chief Justice of England.

When Chitty was at last promoted to the Court of Appeal he took his proper position at once. His reputation appeared to grow all of a sudden. And that division of the Court to which he happened to be attached for the time seemed to be the strongest and the most attractive.

With his singular knowledge of Common Law, his perfect mastery of Equity, his thorough good sense and breadth of view, and his complete loyalty to his colleagues, there can be no doubt that if he had been spared, his influence in the Court of Appeal would have been very powerful, and his decisions would have commanded the increasing respect of the profession. But that was not to be. He has passed away too soon. His place has been worthily filled, and by one whom he would have wished to succeed him. But there are some to whom the world will not be quite the same, deprived of the light and sunshine of his companionship.

M.

THE LAW MERCHANT AND TRANSFERABLE DEBENTURES.

MANY joint stock companies now issue debentures payable to bearer. These debentures are made subject to various conditions and therefore are not promissory notes. Are they negotiable instruments? Have they become such by the usage of trade? Mr. Justice Blackburn and the Court of Queen's Bench, in *Crouch* v. *Credit Foncier of England*[1], decided that they were not and could not be negotiable. Mr. Justice Kennedy, in *Bechuanaland Exploration Company* v. *London Trading Bank*[2], has decided that they are. No question can be of greater commercial importance.

In deciding contrary to Justice Blackburn's judgment, Mr. Justice Kennedy did not, of course, venture to overrule, or on his own authority to differ from *Crouch* v. *Credit Foncier of England*. But he came to the conclusion that *Crouch* v. *Credit Foncier of England* had been overruled by the Exchequer Chamber in *Goodwin* v. *Robarts*[3], a case which was finally dealt with in the House of Lords[4]. Other equally distinguished lawyers have come to the opposite conclusion. Mr. Justice Manisty had the identical question presented to him for decision in *London and County Banking Company* v. *London and River Plate Bank*[5], and he held that *Crouch* v. *Credit Foncier of England* was still law. 'I am quite aware,' he says, 'that this decision has been the subject of comment by the Lord Chief Justice Cockburn in *Goodwin* v. *Robarts*.... No doubt the comments of that very learned judge are entitled to great weight, but I cannot think that they ought to prevail against that which seems to have been very clearly decided in *Crouch* v. *Credit Foncier of England*.'

Judge Willis in his published lectures on negotiable instruments says[6]: 'Mr. Justice Blackburn would, in my view, have certainly acquiesced in the decision in *Goodwin* v. *Robarts*. I do not think the observations of Cockburn C.J. in *Goodwin* v. *Robarts*, when that case was before the Exchequer Chamber, have affected in any degree the binding effect of *Crouch* v. *Credit Foncier of England*.' This work, as its author is happily still living, cannot be quoted as an authority in our Courts, but the student of law may find in its

[1] L. R. 8 Q. B. 374. [2] '98, 2 Q. B. 658. [3] L. R. 10 Ex. 337.
[4] 1 App. Ca. 476. [5] 20 Q. B. D. 232. [6] Willis on Negotiable Instruments, p. 36.

pages more learning and a clearer exposition of law than is to be found in a volume of the decisions of divisional courts.

The facts which gave rise to the question in the two cases were practically the same. In *Crouch* v. *Credit Foncier of England*, an English joint stock company had issued debentures expressed to be payable to bearer, which, from the conditions contained in the debentures, could not be held promissory notes. One of these debentures had been stolen and had been purchased by the plaintiff without knowledge of the theft. The company, having had notice of the robbery, refused to pay the amount due on the debenture to the plaintiff, and thereupon the action was brought by him as holder of the debenture to recover the amount, and was defended in the name of the company by the person from whom it had been stolen. The question therefore was whether the plaintiff, who had taken the debenture for value without notice of the theft, was entitled in his own name and for his own benefit to recover the money secured by the instrument.

In *Bechuanaland Exploration Company* v. *London Trading Bank, Limited*, the plaintiffs were the owners of similar debentures issued by a joint stock company. These debentures were stolen by their secretary and were pledged by him with the defendants, who received them in good faith and without any reason for supposing that the secretary was acting dishonestly in the matter. The action was brought by the plaintiffs to recover the value of the debentures. The learned judge held that the plaintiffs had not so acted as to estop themselves from denying that the defendants were the lawful holders of the debentures, and therefore the question arose whether the plaintiffs, from whom they had been stolen, or the defendants, who had taken them bona fide and for value from the thief, were entitled to the documents and the benefit of the contracts contained in them. The question whether the holder is entitled to the document is not identical with the question whether he is entitled to sue upon it in his own name. But, as pointed out by Blackburn J., the two questions are closely connected; and it may be taken as the rule of English law that the right to the property in the instrument is incidental to the legal right to put it in suit. In the words of the author of Smith's Leading Cases [1]:—

'Whenever an instrument is such that the *legal* right to the property secured thereby passes from one man to another by the delivery thereof, it is, properly speaking, a negotiable instrument, and the title to it will vest in any person taking it bona fide and for value, whatever may be the defects in the title of the person transferring it to him.'

[1] Notes to *Miller* v. *Race*.

And a similar proposition is stated by the author in another passage which is adopted by Justice Blackburn in his judgment:—

'It may therefore be laid down as a safe rule that when an instrument is by the custom of trade transferable, like cash, by delivery, and is also capable of being sued upon by the person holding it *pro tempore*, then it is entitled to the name of a negotiable instrument, and the property in it passes to a bona fide transferee for value, though the transfer may not have taken place in market overt. But that if either of the above requisites be wanting, if it be either not accustomably transferable, or, though it be accustomably transferable, yet if its nature be such as to render it incapable of being put in suit by the party holding it *pro tempore*, it is not a *negotiable instrument*, nor will delivery of it pass the property of it to a vendee, however bona fide, if the transferor himself have not a good title to it, and the transfer be made out of market overt.'

The statement of law contained in this passage may be considered as established. It has not been questioned in any of the cases subsequent to *Crouch* v. *Credit Foncier of England*, and the reasoning of Justice Kennedy's judgment assumes it to be correct. If *Crouch* v. *Credit Foncier of England* was right in deciding that the bona fide holder of an English company's debenture, taking it from a person without title, could not sue upon the instrument, then such a holder was not entitled to the document itself as against the person from whom it had been stolen. If Justice Blackburn's judgment had been overruled, the holder was entitled to keep the stolen debenture which had come into his hands. That is the view of the case taken by Justice Kennedy, when he addresses himself to the question whether the debentures before him were *negotiable instruments*.

That these incidents attaching to negotiable instruments are exceptions from and contrary to the general English law of contracts is undeniable. And no parties can attach these incidents to any instruments other than those recognized as negotiable by the law merchant. 'Independently of the law merchant and of positive statute the law does not enable any man by a written engagement to give a floating right of action at the suit of any one into whose hands the writing may come, and who may thus acquire a right of action better than the right of him under whom he derives title.' This is the judgment of the House of Lords delivered by Lord Chancellor Cranworth in *Dixon* v. *Bovill*[1], and cannot be questioned. But it leaves open the question whether the law merchant is a fluctuating law varying from time to time with the practice of trade, or whether it is, so far as English law is concerned, a fixed code which cannot be altered except by

[1] 3 Macq. H. L. 1.

statute. Justice Blackburn's judgment distinctly lays down the latter view. Justice Kennedy considers that he is bound by the reasoning of the judgment of the Exchequer Chamber in *Goodwin* v. *Robarts* to hold the contrary. A long line of decisions seems to support the view of Mr. Justice Blackburn. It will be noticed that that learned judge speaks of 'the *ancient* law merchant which forms part of the law, and of which the Courts take notice.' It has, according to his view, been incorporated into our law as an ancient law of known and settled rules, of which English Courts take judicial cognizance, a code which in his view cannot be altered by modern usage. It is against this position of Justice Blackburn, namely, that the law merchant is an ancient and fixed law, that a great part of the judgment of Cockburn L.C.J. in *Goodwin* v. *Robarts* is directed, and from a consideration of the language on this point used in the Exchequer Chamber, Justice Kennedy has held that *Crouch* v. *Credit Foncier of England* must be treated as overruled. It is apparent however from the reports of *Goodwin* v. *Robarts* that in none of the Courts before which that case came was *Crouch* v. *Credit Foncier of England* overruled expressly, and neither in the Court of Exchequer nor in the House of Lords was it questioned or doubted; and moreover the facts of the two cases were so different that any expressions of disagreement in *Goodwin* v. *Robarts* from the judgment of Justice Blackburn in *Crouch* v. *Credit Foncier of England* were necessarily somewhat in the nature of *obiter dicta*. The documents, the title to which was in question in *Goodwin* v. *Robarts*, were scrip of foreign governments, which by their terms entitled the holder on the payment of certain instalments of money to receive bonds of such governments for the payment of specified sums of money. The scrip had been left by the plaintiff in the hands of a broker to be dealt with as the plaintiff should direct. The broker having pledged the scrip to the defendants as security for a loan on his own account, the action was brought by the plaintiff to recover from the defendants the value of the scrip. On the creation of these instruments and the rights arising under them in the country where they were issued, the English law had no bearing. It is perfectly competent to a foreign government to create a transferable obligation binding itself to pay money to the holder of the document *pro tempore*, as it was for our own government by Act of Parliament to create exchequer bills payable to bearer.

The law of any foreign country may allow corporations or individuals to make similar transferable contracts. Whether in England such securities are to be regarded as negotiable is another question. There is nothing inconsistent with the general prin-

ciples of English law in recognizing the right which is given to the holder of a foreign instrument by the law of the country in which it was made and in which it is to be discharged, or in allowing to such holder the right to the possession of the instrument itself.

It is true that in the case of the securities of a foreign government there is no right of action to enforce payment in our Courts, but the right to payment resting on the good faith of the State is given to the holder for the time being of the instrument independently of his being able to trace a title from the person to whom it was first issued. The first and principal element of negotiability, namely, that the right to payment of the money secured passes by delivery of the instrument, exists in the country of issue unaffected by the rule of English law applicable to English contracts. That such a security can be received as a negotiable security in England has been settled for three-quarters of a century. The question was decided in *Gorgier* v. *Mieville* in 1824[1] with reference to Prussian bonds payable to bearer, which, it was proved, 'were sold in the market and passed from hand to hand daily like exchequer bills at a variable price according to the state of the market.' One of these bonds had been deposited by the plaintiff with his agents. The agents pledged the bond with the defendants for an advance on their own account. Abbott C.J. and the other judges of the Court of King's Bench held that the instrument was in its nature analogous to a bank note or a bill of exchange endorsed in blank, and whoever was the holder could give a title to any person acquiring it honestly. On the same principle it was decided by the Court of Exchequer in 1838[2] that Russian, Spanish, and Dutch bonds payable to bearer, which had always been treated as marketable in England and transferable by delivery, were, as negotiable securities and equivalents to cash, subject to Probate duty. At the same time the fact that foreign government bonds are negotiable in the country of their issue is not sufficient to make them negotiable in England without proof that they are by the custom of English merchants treated as negotiable in this country. The question arose in *Picker* v. *The London and County Banking Company*[3], where the plaintiff, who was the owner of Prussian bonds which were issued with coupons for interest attached, had been robbed of the bonds, but the coupons remained in his possession. It was not proved at the trial that the bonds without the coupons were treated as negotiable in this country. And the Court of Appeal decided that in the absence of such proof the plaintiff was entitled to recover the bonds from the defendants who had received them in the ordinary course of their banking business.

[1] 3 B. & C. 45; 27 R. R. 290. [2] *Att.-Gen.* v. *Bouwens*, 4 M. & W. 171. [3] 18 Q. B. D. 515.

'A Prussian thaler is current in Prussia, but it is not current in London; nor because a negotiable instrument is current in one country and part of the cash of that country, is it therefore a negotiable instrument or part of the cash of England[1].' In these and other cases there is ample authority to show that modern mercantile usage is both necessary and effectual to make negotiable in this country foreign instruments which are, like our own exchequer bills, negotiable in the country of their creation.

If the decisions in *Gorgier* v. *Mieville*, and *Attorney-General* v. *Bouwens* were law, it was clear that foreign government bonds expressed to be payable to bearer, if treated by modern usage as marketable and transferable by mere delivery, possessed in England all the qualities of negotiable instruments. And though some of Justice Blackburn's language in *Crouch* v. *Credit Foncier of England*, if looked at apart from the facts of the case before him, might possibly be mistaken to conflict with these decisions, it is clear that it was intended to have no such meaning. After referring to *Gorgier* v. *Mieville*, he says :—

'We have no intention to throw the least doubt on this decision, but we do not think it applicable to an English instrument made in England, and we express no opinion as to what might be the law as to obligations made by subjects abroad which by the law of the country where they were made are negotiable in that country. We confine our judgment to the case before us, which is that of an English instrument made by an English company in England.'

In deciding as to English contracts that no modern usage can make them negotiable, the line of reasoning taken by Justice Blackburn is clear. No person, whether an individual or a body corporate, can make a transferable contract, with the exception of such instruments as are authorized by the ancient law merchant, to which the incidents of negotiability are by that law annexed. The law merchant is part of the common law; as such, judicial notice is taken of it; it is not a matter for the evidence of witnesses or the verdict of juries; no amount of modern usage can alter it. As between the immediate parties to a contract usage may tacitly incorporate terms which the parties were at liberty expressly to insert. It cannot annex qualities to an instrument which the parties cannot by express stipulations annex. One thing which neither the parties nor modern usage can do is to deprive a future owner of the instrument of the right to recover his property if stolen. Too much attention cannot be drawn to this last point. The attempt of persons to create new forms of negotiable instruments, or to annex by usage the quality of negotiability, is an

[1] Lindley L. J. in *Williams* v. *Colonial Bank*, 38 Ch. D. 404.

attempt to deprive persons who are not parties to the instrument of the right given them by the general law of the land. Up to the time of Justice Blackburn's judgment, and in fact up till the day when the judgment of the Exchequer Chamber was delivered in *Goodwin* v. *Robarts*, there were many authorities supporting Mr. Justice Blackburn's decision, and, it may pretty safely be said, none against it. In *Edie* v. *East India Company*[1] it was decided that long modern usage, supported by the strongest evidence and sanctioned by the verdict of a jury, could not make the indorsement of a bill of exchange to a particular indorsee restrictive. Lord Mansfield at the trial admitted evidence of the usage, and told the jury that if they found an usage *so established and settled* amongst merchants and traders as to be *clear* and *plain* and beyond doubt, they might find a verdict for the defendants. But on the argument of a rule for a new trial he was clearly of opinion that he ought not to have admitted any evidence upon the point, as the law was settled. And he went on to show that the point was settled not by the verdicts of juries but by judgments of the Court, who treated the question as one of which they had judicial cognizance. 'The point in question,' said Denison J., 'is not matter of fact but matter of law.' On the same ground it was decided by the Exchequer Chamber, in *Partridge* v. *Bank of England*[2], that the usage and custom of bankers could not make the dividend warrants of the Bank of England negotiable. 'The usage,' said Tindal C.J., in delivering the judgment, 'is described as an usage and custom of bankers and merchants used and approved of for divers to wit sixty years, according to which dividend warrants pass by delivery without indorsement, and the *bona fide* holder thereof is entitled to receive the amount from the defendants, which is *rather a practice of trade than a custom* properly so called, and *such a practice cannot alter the law* by which such an instrument does not confer any right of action on an assignee. . . . It by no means follows from this opinion that mercantile usage or the practice of particular trades or places is inoperative. Such usage and practice may have and often has an important operation *between parties who contract* with a knowledge of its existence and with reference to it.' These last words show the exact sphere in which modern mercantile usage can operate, and the essential difference between it and the law merchant, which forms part of the general law of England. The same distinction between modern usage and the law merchant is drawn by Lord Ellenborough in the case of East India bonds[3]. After referring to the fact that it was not stated in the pleadings that such bonds were in practice treated as negotiable, he says:—

[1] 2 Burr. 1216. [2] 9 Q. B. 396. [3] *Glyn* v. *Baker*, 13 East, 509; 12 R. R. 414.

'But supposing it were so stated, how could a right of action upon these securities be made to pass by *such a practice* to the holder of them where by law no such right passes? There must always be that impediment to the legal negotiability of such instruments; which distinguishes them from bills of exchange and securities of that nature in which the legal interest passes *under the law merchant*, by indorsement and delivery to another.'

Such being the *consensus* of authority in support of the view taken by Blackburn J. and the Court of Queen's Bench, how was their decision treated in the judgment of the Exchequer Chamber in *Goodwin* v. *Robarts*? The instruments which came in question in that case were the scrip issued by the agents of foreign governments, and unless they could be distinguished from *foreign government bonds*, payable to the bearer, they fell within the decision in *Gorgier* v. *Mieville*, and according to the practice of merchants and bankers were negotiable, like bills of exchange or bank notes. The argument which the judgment of Cockburn L.C.J. is directed to answer is stated by him in his judgment[1]:—

'That the contract arising on the scrip must be taken to have been made here, and must be dealt with according to English law. That this being so, the case of *Crouch* v. *The Credit Foncier of England* was an authority which established that it was not competent to anyone, by the law of England, to give to a security, not negotiable by the law merchant, the character of negotiability by making it payable to bearer.'

He then proceeds to show, what was afterwards affirmed by the House of Lords, that the securities were those of the foreign governments and were equivalent to government bonds. Having thus distinguished the case from *Crouch* v. *Credit Foncier of England*, he goes on to show that the law merchant is not so fixed and invariable as to prevent such instruments becoming negotiable. The question being limited to the securities of a foreign government, it was unnecessary to review the decision in *Crouch* v. *Credit Foncier of England*, which was confined to English contracts; and no one would probably have regarded the observations of the Chief Justice on that case as anything but *obiter dicta*, but for one sentence in his judgment[2], in which he says that 'it is unnecessary to enter into the question whether the contract entered into is to be considered as a Russian or an English contract, as its negotiability must depend not on what might be its negotiability by the foreign law, but on how far the universal usage of the monetary world has given it that character here.' This view of the question to be decided was certainly not taken by the House of Lords.

[1] L. R. 10 Ex. 343. [2] p. 345.

But nevertheless the observations which follow must be taken as intended to reflect on the judgment in *Crouch* v. *Credit Foncier of England*. They are shortly to the following effect. The law merchant is not an ancient law, but the variable mercantile practice of modern times; bills of exchange are of comparatively modern origin, being first brought into use in Italy in the twelfth and thirteenth centuries, and not used by English merchants till much later; they are first mentioned as discussed in English Courts in the time of James I. The law merchant therefore regarding them is no part of the old common law, but a modern law resting on the practice of merchants which may vary from time to time. From which it follows, as pointed out by Justice Kennedy, though not so clearly put by Cockburn C.J., that it is not a law of which the Courts take judicial cognizance, but one on which evidence is admissible, and which is to be found as a matter of fact by a jury. 'The law merchant,' says the Chief Justice, 'with reference to bills of exchange and other negotiable securities, though forming part of the *lex mercatoria*, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which upon such usages being proved before them, have adopted them as settled law, with a view to the interests of trade and public convenience, the Court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, *in giving effect to the contracts and dealings of the parties*, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in any particular department.' It is hard to believe that the judges in whose name this judgment was delivered were parties to a proposition of which the fallacy is so transparent. It amounts to this, that the law merchant governing the rights of third persons is merely an application of the general rule that the parties to a contract contract *inter se* according to the usual practice of their trade.

Whether bills of exchange first came into use among the Florentines in the twelfth and by the Venetians in the thirteenth century, as supposed by Cockburn C.J., their origin is, as stated by the author of Chitty on Bills, lost in obscurity [1]. And there can be little doubt that they had come to be a common instrument of commerce between the merchants of trading cities long before they came to be used and recognized in England, and before foreign trade had begun to flourish in this country. 'The necessity of trade and commerce and the usefulness and convenience of trans-

[1] Chitty on Bills, chap. 1.

ferring money by bills of exchange has introduced the same; and the civil law allowing them in other nations has introduced them here[1].' They were, in fact, from times of remote antiquity part of the currency of merchants abroad, and when Englishmen came to engage in trade with foreign merchants, they necessarily adopted the same instruments of currency.

Malynes, the author of the Lex Mercatoria, is referred to by Chief Justice Cockburn as unaware in 1622 of the use of bills of exchange in England. The passage referred to is evidently one in which the author is speaking of 'bills obligatory,' and after stating that they are in common use abroad, he says[2], 'This laudable custom is not practised in England.' But bills obligatory are distinguished by him from bills of exchange. They were also called bills of debt, and were, as appears from his account of them[3], more in the nature of Lloyds' bonds, being acknowledgments of indebtedness for goods purchased from some merchant, which acknowledgment the merchant signing the bill was estopped from denying, followed by a promise, sometimes under seal, to pay the amount of the debt to the merchant or his assigns or the bringer thereof. Malynes himself gives the form of a bill of exchange drawn by a merchant in London, and of one drawn upon London by a merchant abroad[4].

The first of these is in this shape:—

Laus Deo. Adi 24 August 1622. £500. 34*s.* 6*d.* At Usance pay by this my first Bill of Exchange to A. B. the sum of Five hundred pounds sterling, at thirty-four shillings and six pence Flemish, for every pound sterling current money in merchandise for the value hereof received by me of C. D. and put it to account as per advice, A. Dio, &c.

On the back is indorsed:—

To my loving Friend Master W. C., Merchant, in Amsterdam, Pa.

The same writer after arguing that the law merchant 'may well be as ancient as any human law' says that this customary law of merchants, of which the law of bills of exchange is one of the three principal parts, is used in all places and is permanent and constant[5].

Bills of exchange are mentioned in a statute of the year 1379[6], but Anderson in his History of Commerce[7] has shown that their use was known in England in the reign of Edward I. And it appears[8] that letters of credit were issued here for use in Italy, and therefore bills of exchange were probably in use, in the reign of John and even in that of Richard I, practically carrying their use back

[1] 2 Show. 501. [2] Chap. xii. p. 73. [3] Chaps. xi-xiii. [4] pp. 269, 270.
[5] Chap. i. [6] 3 Rich. II, c. 3. [7] Vol. i. 274.
[8] Macpherson's Annals of Commerce, vol. i, p. 367. Daniel on Bills of Exchange, vol. i, p. 5.

to the time at which, according to English law, legal memory begins, certainly earlier than any trace can be found of many local customs which have been proved in our Courts, and long before a great part of our common law was settled. But the question of the date at which negotiable instruments found their way into general use in England or were brought under the consideration of English Courts is really beside the question. The common rule of our law being that where a custom is found to have been invariable as far back as there is any evidence on the subject, and there is nothing to show that it cannot have existed before the time of legal memory, it is taken to be immemorial and binding. And whatever may have been the date at which the law merchant came to be recognized as part of the common law by English Courts, there is a manifest difference between the admission of a customary law already known and accepted among the merchants of other trading nations, and the admission of modern usages varying from time to time according to the practice of particular trades. Many of the rules of the law merchant and maritime law as forming part of the common law of England were not settled till the time of Lord Mansfield. But he laid down those rules not as a modern introduction, but as part of the established law of mercantile and maritime nations. 'Non erit alia lex Romae, alia Athenis; alia nunc, alia posthac; sed et apud omnes gentes et omni tempore, una eademque lex obtinebit[1].'

Chief Justice Cockburn cites several cases as supporting the view that the law merchant varies from time to time according to the practice of merchants. But when these cases are examined they lend no support to such a doctrine. He says that the question whether an instrument was negotiable arose in *Wookey* v. *Pole*[2] in respect of an exchequer bill, notoriously a security of *modern growth*, 'and it was held by three judges of the Queen's Bench, Bayley J. dissentiente, that an exchequer bill was a negotiable instrument.' But exchequer bills were not securities of modern growth, but were the creation of Statute, which provided that they should be put into circulation and be treated as equivalent to ready money. 'The instrument,' says Justice Holroyd, 'is created by the Statute 48 Geo. III, c. 1, and is thereby made negotiable and current.'

The real point decided in the case apart from the effect of the Statute was that, as the holder *pro tempore* of an exchequer bill was entitled to the money secured by the instrument, he was also entitled to the document itself. There is nothing in the case to give any countenance to the idea that modern practice could

[1] *Luke* v. *Lyde*, 2 Burr. 887. [2] 4 B. & Ald. 1; 22 R. R. 594.

enable any person to make an English contract giving the legal right to sue upon it to the holder for the time being.

The Chief Justice cites as 'another very remarkable instance of the efficacy of modern usage,' the obligation which attaches to a banker on the receipt of money from a customer to repay it by honouring his customer's cheques, which was recognized by the Court of Exchequer in *Pott* v. *Clegg*[1]; and the custom of marking cheques as good for clearance by which they become bound to one another. These are merely instances of stipulations or conditions agreed to between the immediate parties to a transaction which they are perfectly capable of making by express terms, and which they are considered tacitly to have agreed to by the ordinary course of the trade. His reference to *Licklarrow* v. *Mason*, as showing that modern usage had made bills of lading negotiable, is, to use the words of Lord Blackburn, 'a great misapprehension[2].' The erroneous notion that bills of lading are negotiable, or that *Licklarrow* v. *Mason* decided any such thing, has been finally disposed of in the House of Lords[3].

The case of *Lang* v. *Smyth*[4], which he also cites, was one dealing with the bonds of a foreign government in which the jury had found that the coupons without the certificate to which they referred were not in practice treated as negotiable. The ruling of Tindal C. J., which was held right by the Court of Common Pleas, was in accordance with *Gorgier* v. *Mieville* and the subsequent case of *Picker* v. *London and County Banking Company*, and had nothing to do with English contracts.

But although the cases cited by Chief Justice Cockburn do not appear to support his judgment, Mr. Justice Kennedy was undoubtedly right in considering that judgment as reflecting adversely on *Crouch* v. *Credit Foncier of England*, although the authorities cited by the Chief Justice do not bear out his conclusions as applied to the negotiability of English instruments. But when we turn to the judgment of the House of Lords[5] we find that no countenance is given to the idea that the law laid down in *Crouch* v. *Credit Foncier of England* is either inconsistent with the judgment in *Goodwin* v. *Robarts* or is in any respect erroneous. And there is not a suggestion in the judgment of any one of the Lords who heard the appeal that evidence of modern usage can establish the negotiability of a contract made under English law. On the contrary, after deciding the case on the ground that the plaintiff, by entrusting scrip payable to bearer to a broker with the opportunity of dealing with it, was estopped from denying the

[1] 16 M. & W. 321. [2] 10 A. C. 98. [3] *Sewell* v. *Burdick*, 10 App. Ca. 74.
[4] 7 Bing. 284; 33 R. R. 462. [5] 1 App. Cas. 476.

title of one who had bought it bona fide from the broker; their lordships affirm the view of the Court of Exchequer and of the Exchequer Chamber, on the ground that the question is confined to foreign government securities and is governed by the undisputed law laid down in *Gorgier* v. *Mieville*. But the matter does not rest here. Lord Selborne, while following exactly the same line of reasoning as the other Lords, expressly refers to the judgment in *Crouch* v. *Credit Foncier of England* as rightly drawing the distinction between the securities of foreign governments and instruments made under English law; and lays down again the very principle upon which the judgment in *Crouch* v. *Credit Foncier of England* is based, that no evidence can be received as to English instruments such as were there brought in question. 'The scrip,' he says, 'in this case is not one of those contracts in writing which have their nature, incidents, and effects defined and regulated by British law, so that a Judge in a British Court is bound without evidence, to know whether (and how, if at all) they are legally transferable, *and to reject any evidence of a customary mode of transfer* at variance with the law. It is not like the Iron note, which was the subject of Lord Cranworth's remarks in *Dixon* v. *Bovill*, nor like the bonds in the case of *Crouch* v. *Credit Foncier Company*. The Court of Queen's Bench, in deciding that case, relied upon the distinction between "English instruments made by an English company in England," and "a public debt created by a foreign or colonial government, the title to portions of which is by them made to depend on the possession of bonds expressed to be transferable to the bearer or holder, on which there cannot properly be said to be any right of action at all, though the holder has a claim on a foreign government." The Russian and Austrian scrip now before your lordships belongs in my judgment to the latter and not to the former category[1].'

The effect of the judgments in the House of Lords in *Goodwin* v. *Robarts* as affirming the principle of Lord Blackburn's judgment in *Crouch* v. *Credit Foncier of England* has not been sufficiently noticed. 'The objection,' says Justice Kennedy, 'to the effect of the usage, if proved, and the objection to the reception of evidence to prove the usage stand or fall together.' 'In the case,' says Lord Selborne, 'of contracts in writing, which have their nature, incidents, and effects defined and regulated by British law, a judge is bound to reject any evidence of a customary mode of transfer at variance with the law.' Lord Selborne would certainly have rejected the evidence admitted by Justice Kennedy, and have felt himself bound to hold the debenture in question not negotiable.

[1] 1 App. Cas. 494.

It is right to mention that in *Rumball* v. *Metropolitan Bank*[1], Cockburn C.J. and Mellor J., while deciding that the case was governed by the doctrine of estoppel laid down by the House of Lords in *Goodwin* v. *Robarts*, held also that the judgment of the Exchequer Chamber applied to an English security.

If the foregoing observations fairly represent the authorities on the subject, there is really a continuous current of authority in favour of the view taken by Justice Blackburn and the Court of Queen's Bench in *Crouch* v. *Credit Foncier of England* broken only by observations in the judgment of the Exchequer Chamber delivered by Chief Justice Cockburn which were inapplicable to the case before him, and adopted as one ground of decision in *Rumball* v. *Metropolitan Bank*. While in that same case of *Goodwin* v. *Robarts* the House of Lords cast no doubt upon the correctness of the decision in *Crouch* v. *Credit Foncier of England*, and give reasons for their judgment which support that decision. And the observations of Cockburn C.J. so far as they are directed against *Crouch* v. *Credit Foncier of England* are based upon a confusion between the law merchant, which is part of the common law and binds every one, and the practice of trade which traders are considered to have in their minds in contracting with one another and which therefore may affect their rights *inter se*.

But apart from legal authority it is worth while to consider the effect of Mr. Justice Kennedy's decision in fact. He is satisfied upon the evidence that there is a usage of merchants to treat *such* debentures as negotiable instruments passing by mere delivery. Mr. Justice Blackburn, if he can be imagined to have admitted such evidence would, we may believe, have brushed it away as a cobweb. No doubt such debentures as were in question were commonly bought and sold and passed by delivery without inquiry into the real title of the vendor, and, except in the rare cases of theft or misappropriation, the purchaser would, for all practical purposes, have an effective title. Tables and chairs and chattels of every description are similarly passed by delivery, but they are not negotiable, and the true owner can recover them if they are stolen. Companies' debentures, which are bought and sold without inquiry into title, are not necessarily part of 'the cash of the country' or of 'the currency of merchants.' An instrument may be 'accustomably transferable,' but not 'negotiable[2].' And how wide, it may be asked, is the class of *such* debentures? The conditions of all companies' debentures are not identical. Are they all, whatever their conditions, negotiable instruments, provided they are expressed to be payable to bearer?

[1] 2 Q. B. D. 194.

[2] Above, p. 132.

And when did such instruments become exceptions to the general law and operate as contracts giving a floating right of action to the holder from time to time? Not when first issued, for there cannot then have been any custom relating to them. And it is conceded that without a custom so settled as to be part of the law merchant, no individual can make such a contract under English law. They were apparently not negotiable in 1868[1]. It must be then that a contract which did not originally give a right of action to any but the parties to it gradually changed its nature so as to become a contract between the maker and third parties. If the instrument in question had been in the form of a promissory note under the hand of an officer of the company, it would not have been negotiable on account of the conditions to which it was subject. Or is the modern usage of merchants to give us new forms of promissory notes which are not allowed by the old law merchant or by the Bills of Exchange Act?

The decision in *Bechuanaland Exploration Company* v. *London Trading Bank* will no doubt be popular among brokers and dealers in the stock of joint stock companies, and especially with those who are most ready to deal in securities to which the transferors have no title. But prudent people will do well not to venture too much in reliance on that decision till the judgments of the great judges who have decided the contrary are overruled by a higher Court.

F. A. Bosanquet.

[1] *In re Natal Investment Co.*, L. R. 3 Ch. 355.

SUBMARINE CABLES IN TIME OF WAR.

SOME of the incidents of the naval operations in the recent war between the United States and Spain have again, after the lapse of several years, drawn general attention to the hitherto uncertain position of submarine telegraphic cables in time of war.

The subject has been little discussed by international lawyers and generally carefully avoided by statesmen and diplomatists. There is not in existence a single international convention having for its object the protection of submarine cables from intentional injury in the course of maritime hostilities, and in fact only one such convention has ever been concluded. This was the treaty signed on May 16, 1864 by representatives of France, Brazil, Hayti, Italy and Portugal, respecting a transatlantic cable proposed to be laid by a certain M. Balestrini. Article 2 ran thus: 'The contracting powers engage not to cut or destroy, in the event of war, the cables submerged by M. Balestrini, and to recognize the neutrality of the telegraphic line.' The exact meaning of this vague clause was never made clear in practice, for M. Balestrini failed to fulfil his engagements, and the treaty therefore never came into operation. In any case it was probably too absolute in its terms ever to have worked well. As M. Renault remarked, 'those who drew it up had forgotten to consult soldiers and sailors.' Since 1864 no similar treaty has been concluded. Doubtless this reluctance to enter into binding engagements has been due to a clearer appreciation of the real difficulties of the subject, and to a feeling on the part of statesmen that it would be unwise to restrain their own freedom of action until wider experience of the part played in war by submarine telegraphy should have shown them where their real interest in the matter lay.

Attempts, however, were not entirely wanting to arrive at a general understanding on the question. Towards the end of 1869 the government of the United States proposed that a conference should assemble at Washington to deliberate on a scheme for an international convention which it submitted to the Powers. Briefly the proposal was to assimilate the destruction of cables on the high seas to piracy in time of war as well as in time of peace. Article 6 provided that communications were to continue in war as in peace, while by Article 3 the governments were to exercise no control over the dispatch of messages. The impracticable character of

this last clause alone ought to have been sufficient to condemn the whole scheme; the distinction, too, apparently intended to be drawn between the destruction of cables on the high seas and similar destruction in territorial waters has no obvious practical reason, so far as war is concerned, though it is a distinction that has more than once cropped up in discussions on this subject. The immediate effects at least of cutting a cable are the same whether it is cut ten miles or one mile from the coast. The majority of the European States, however, were willing to allow their representatives at Washington to take part in the negotiations, but England and France showed more reserve, and it was the concurrence of these two Powers which was most important to the United States, since the cables connecting Europe with America start from their territory. In spite of this the conference would probably have assembled had not the Franco-Prussian war distracted the attention of the governments from the project.

The politicians of America failed, but the subject had now begun to attract the notice of jurists. In the following year, M. Rolin-Jaequemyns, the eminent Belgian international lawyer, called attention to the increasing urgency of the demand for treaty regulation of the position of submarine cables, and the cases of cable-cutting that occurred during the war between France and Prussia must have given point to his words, though he appears only to have had in his mind the protection of cables during peace. Writing in the Revue de Droit International (tome ii. p. 322), M. Rolin-Jaequemyns said:—

'Submarine cables are multiplying in number and will soon form an interesting topic of international law. It is not enough to regulate the establishment of cables within the limits of the jurisdiction of each State, that is to say, according to the law of nations, to a distance of three marine miles from its coasts. It will further be necessary to provide, by means of international treaties, for the protection of cables under that immense portion of the ocean which belongs to no State.'

At the Conference of the Telegraphic Union held at Rome in 1871, the Norwegian delegate proposed that a commission should be named from among the members of the conference to prepare a project for a convention with the object of regulating the condition of telegraphs in time of war. This proposal was rejected as not within the competence of the conference. Yet a more drastic proposal of Mr. Cyrus Field, the American delegate, was received with greater consideration. He communicated to the delegates a strong letter on the subject from the veteran electrician Samuel Morse, and demanded that the conference should itself take the initiative and

prohibit the destruction of lines or apparatus, while permitting the transmission of inoffensive dispatches notwithstanding the existence of war. He failed, as the authors of such proposals always have failed, to suggest any means of guaranteeing the inoffensiveness, from a belligerent point of view, of private or seemingly private dispatches. In the result the conference declared that the matter was deserving of the attention of their governments, and commissioned the Italian foreign minister to bring this declaration to the knowledge of the Powers. Accordingly that minister did so, but without making any definite proposal, out of deference to the government of the United States, which had two years before taken the initiative in the matter. The Austro-Hungarian government alone made any reply to this communication. In a note discussing the ideas propounded by Mr. Field, it said, 'that it would always be disposed to respect submarine telegraph cables, or at least to confine itself to preventing an enemy making use of them, without in any case destroying them; consequently it considered that an effectual means of guaranteeing their safety would be found in the institution of a commission, either of belligerents or of neutrals, which should place them and keep them under sequestration.'

The Conference of Brussels which assembled in 1874 by the invitation of the Emperor of Russia for the purpose of discussing a project of international rules on the laws and usages of war did not directly deal with the question of submarine cables. The Danish representative proposed that landing cables (câbles d'atterrissage) should be included under 'land telegraphs' which by Article 6 were allowed to be seized by an occupying army as 'means of a nature to aid in carrying on war.' He withdrew his proposal, saying that his government would later on make it the subject of communications to the other governments.

In 1876 Dr. P. D. Fischer, an official in the German postal service, published at Leipzig a monograph entitled 'Die Telegraphie und das Völkerrecht,' dealing with the whole question of the protection of submarine cables in time of peace and in time of war.

In order to protect cables from the consequences of belligerent operations it would, he thinks, be necessary (1) to prevent the furtherance directly or indirectly of military plans by forwarding dispatches from or to the belligerents; (2) to subject the forwarding of dispatches to a strict control in order to prevent abuses; (3) to concede to the belligerents the right of decreeing the suspension from time to time of the dispatch of messages from and to the enemy's territory by the cables running under their sphere of jurisdiction. He suggests two methods of bringing about these results. Firstly, the belligerents themselves might undertake in

common the administration of submarine cables running from their territories to neutral States, working by means of a commission composed of equal numbers of officials from each, thus following the example of the Telegraphic Union in time of peace. The difficulties that would have to be overcome in carrying out such a plan as this, involving as it would the co-operation of the hostile powers at the very moment when relations between them are of the worst kind, are obvious, as Dr. Fischer points out, and in practice they would probably be found insuperable. The plan he himself prefers is the second. By this the belligerents would, during the continuance of the war, hand over the administration of the cables connecting with their shores to neutrals. The administration might be carried on by officials of two neutral States, one chosen by each of the belligerents. Dr. Fischer contends that such an arrangement would give the belligerents a sufficient guarantee for the impartial management of the international service and the scrupulous exclusion of any abuses. Within these limits the neutralization of submarine cables is not unattainable. To bring the matter within the sphere of practical international law attention must be paid in framing treaties of peace, alliance, commerce and navigation to the insertion of a common clause giving effect to this scheme. Treaties, Dr. Fischer remarks in accordance with the common continental view, are the most abundant source of international law, and through their means might be introduced the principle of the neutralization of submarine cables.

The subject was next discussed, and in the fullest manner in which it has been treated, by the Institute of International Law. At the meeting of the Institute in Paris in 1878, M. Louis Renault proposed that a committee should be appointed to study 'The means of protecting against destruction, in time of peace and in time of war, submarine telegraph cables which are of international importance.' The proposal was adopted and a committee appointed consisting of M. Renault of Paris, who was reporter, M. Bluntschli of Heidelberg, M. Goos of Copenhagen, M. Saripolos of Athens, and Mr. Westlake of London. They presented their report at the Brussels meeting of the Institute in 1879. (The report is printed in the Annuaire de l'Institut de Droit International, vol. 3–4, part 1, pp. 351 foll., and was published by M. Renault as an article in the Revue de Droit International 1880, tome xii, p. 251.)

In the second portion of this report the committee deal with the question of the protection of cables in war. Putting aside as impracticable all proposals for the 'neutralization' of submarine cables they proceed to consider the different cases that present themselves in practice.

(1) When the cable unites two portions of the territory of the same belligerent, e. g. Italy with Sardinia or Sicily, France with Corsica or Algeria, England with Ireland. Here they consider no measure can be taken to ensure the maintenance of telegraphic communication during war. The service may be suspended or the cable destroyed by the belligerent whose territories it connects, whether the cable belongs to the government or to a private company; it is purely a question for the municipal law of the territory. Article 7 of the Convention of the Telegraphic Union reserves this right absolutely to the different governments. In the same way the other belligerent may destroy the cable, and this either on the high seas, or in the territorial waters of his enemy.

(2) When the cable unites the territories of the two belligerents. In such a case either belligerent has a right to interrupt the communications and there is no means of preventing him. A State cannot be forced to keep up a means of communication with its enemy which may be abused to its own injury.

It is to be observed that in both of these first two cases neutrals may suffer from the interruption of communication, e. g. Switzerland or Belgium might be interested in keeping up communications with Algeria, although France may be at war. Similarly destruction of the cables between the United States and Great Britain would be a grave injury to the whole European continent if there were no cables connected with a neutral country. These indirect injuries to neutrals are consequences of the war which cannot be avoided.

(3) When the cable connects the territory of one belligerent with a neutral territory. The belligerent on whose coasts the cable terminates has, just as undoubtedly as in the first two cases, the right to restrict or suppress communication; this is a consequence of the right of sovereignty recognized by the convention of St. Petersburg. The other belligerent ought on principle (so the committee think) to respect the cable, since communication between neutrals and belligerents is permitted. If, however, he obtains possession of the portion of his enemy's territory where the cable ends, he could, in virtue of the rights conferred by occupation, take any measures he may judge necessary for his defence, and these might frequently include the destruction of the cable. The general rule of freedom of communication between belligerents and neutrals is subject to two important restrictions. First, neutrals may not communicate with a blockaded port, and therefore the blockading power could cut a cable running from a neutral territory to the blockaded port, 'just as it could seize a packet-boat carrying dispatches.' The justice of the analogy contained in the sentence just

quoted is not apparent, for a belligerent has undoubtedly the right to seize a neutral packet-boat carrying military or other government dispatches for his enemy, and this quite apart from any question as to the existence or not of a blockade of the port to which the vessel is proceeding. This point is indeed included in the second exception which the committee give to the general freedom of communication between neutrals and belligerents. This second exception relates to the carriage of contraband. Neutral commerce with belligerents must not have for its object the carriage of contraband of war, and for this purpose the latter includes dispatches. But how is the innocent character of telegraphic dispatches to be ensured? The committee proceed to criticize Dr. Fischer's two plans (see above). Of these the first is open to the objection that it requires that the belligerents should come to an agreement at the precise moment of breaking off amicable relations, and that they should during the war permit the presence of enemies upon their territory. The second plan is better, but would not get rid of all difficulties. 'With all the impartiality possible the transmission cannot be prevented of dispatches quite innocent in appearance and giving in language previously agreed upon valuable information as to military operations. When belligerents suspect this they will not hesitate to put an absolute stop to the service.'

The committee's conclusion on this third case, the most important of all, is that no absolute rule can be laid down. Belligerents will continue to claim freedom of action while restricting their interference with telegraphic communication to what is imperatively demanded by their military interests.

(4) The last case is that of a cable between two neutral territories. Here the committee lay down the strict rule that the destruction or even the momentary interruption of the cable by a belligerent can never be justifiable. It would be as unjust as stopping a steam-packet running between two neutral countries.

The report concludes with these words:—

'To sum up, the case in which the submarine cable connects two neutral territories is the only one in which, according to the rules of international law, the cable is truly inviolable. We cannot hope for an international convention which should declare in all cases that cables cannot be destroyed, and the service must never be interrupted; this degree of security for international telegraphs will only be attained when war itself has disappeared. Meanwhile we must try to soften the rigour of the measures taken by military authorities; thus when telegraphic communication must be stopped, it might be arranged that it should cease, without destroying an establishment which perhaps cost millions: in such a case the method of sequestration mentioned in the Austrian note might be

applied. Can we go farther and establish absolute freedom of telegraphic communication between neutrals and belligerents? We dare not propose it.'

The committee proposed three 'conclusions,' which were discussed by the whole Institute.

1. 'Le câble télégraphique sous-marin qui unit deux territoires neutres est inviolable.' This clause was adopted unanimously without discussion.

2. 'Il est à désirer que, quand les communications télégraphiques doivent cesser par suite de l'état de guerre, on procède simplement par voie de séquestre et non par destruction.' In the discussion on this clause the word 'séquestre' was objected to as being obscure. For example, in the case of a war between the United States and France, how could France sequestrate the part of the cable which ends on the American coast, or that which ends on the English coast? Finally the clause was altered to

'Il est à désirer, quand les communications télégraphiques doivent cesser par suite de l'état de guerre, que l'on se borne aux mesures strictement nécessaires pour empêcher l'usage du câble.'

Such a rule as this practically leaves the whole question of the treatment of a cable between a belligerent and a neutral country to the discretion of the hostile commanders. It is no more than a particular application of the general principle which lies at the root of the laws of war, that military (including of course naval) operations must not be carried further than is absolutely required by real military necessity, which in its turn must generally be left to be determined by the military authorities.

3. 'La destruction, dans tous les cas, devrait être opérée de la manière la plus restreinte, et le belligérant qui en serait l'auteur devrait rétablir le câble aussitôt que possible après la cessation de la guerre.' In the general discussion the imposition of the obligation to repair the cable on the belligerent who destroyed it was objected to, and the clause was adopted in the following form (running on from No. 2).

'Et qu'il soit mis fin à ces mesures, ou que l'on en répare les conséquences, aussitôt que le permettra la cessation des hostilités.'

In view of the importance which has been attributed in some recent utterances on the subject to the private ownership of cables it is perhaps worth noticing that during the discussion on this last resolution, M. de Bar proposed the following addition:—'La destruction des câbles sous-marins donnera lieu à des dommages-intérêts au profit des propriétaires des câbles.' Other speakers pointed out that this was a matter rather of municipal than of international law, and M. de Bar withdrew his proposal. This seems to show

that the Institute did not attach any importance to the fact that submarine cables mostly belong to private persons, of whatever nationality they may be, as affecting the rights of belligerents. The point is sufficiently covered by the general rule which permits a belligerent to suppress the traffic of neutral subjects with his enemy which directly injures his military prospects.

The only definite rule for practice that can be extracted from the conclusions of the Institute is that which declares cables connecting two neutral territories inviolable, a rule which would probably meet with universal acquiescence. The wisdom of the Institute in refraining from laying down more sweeping rules is proved by the policy since pursued by the Powers and especially by the events of the recent Spanish-American war. The general policy of the various governments is significantly exemplified in the Telegraphic Convention of 1884. Provision is made for the punishment of persons guilty of wilful or culpable damage to a cable, while Article 15 runs thus: 'The stipulations of the present convention do not in any way restrict the freedom of action of belligerents,' a provision against which the Belgian government alone protested as 'absolument inutile[1].'

A recent, but scarcely satisfactory, discussion of the position of submarine cables in war is to be found in a work of M. Léon Poinsard, 'Études de Droit International Conventionnel,' Première Série, Paris, 1894. His conclusions are practically the same as those of the Institute of International Law, except as regards cables between a belligerent and a neutral country. In this case he would not allow the enemy to cut the cable except when he occupies or blockades the point where the cable enters the sea, and even then he must only cut it within the territorial waters of his adversary. By this rule the American admirals would more than once have been guilty of illegal practices, yet the great European powers who are most keenly interested in the matter have made no protest. M. Poinsard's restrictions are not likely to be regarded as authoritative outside the covers of his own book.

We may probably take the position of cables between two neutral countries to be fairly secure, and no question need arise as to that of cables between the two belligerent States.

The most difficult case is that of a cable connecting a belligerent with a neutral country, but the only possible conclusion, taking into consideration the views that have been expressed on the topic, scantily and indirectly by governments, more fully but still

[1] [The caution is or ought to be abundant; nevertheless we beg the English reader not to forget that 'inutile' means 'superfluous' or 'needless' rather than 'useless.'—Ed.]

cautiously by jurists, seems to be that a belligerent has a right to cut such a cable if military necessity demands it. No scheme yet propounded for the 'neutralization' of submarine cables seems at all feasible. Setting aside, therefore, all such plans it is difficult to see by what principle of international law a belligerent can be held precluded from cutting all cables running to his enemy's territory. According to a well-recognized rule of international law, a belligerent is entitled to prevent the carriage of military or other government dispatches for the service of his enemy by neutral ships. Why then must he suffer such messages to be sent by a cable which it is in his power to cut at any moment? Until some method of guaranteeing the innocence of all messages from neutral to enemy territory can be invented, belligerents will probably secure themselves by cutting the cable. In the war of this year, in which naval operations played so great a part and which attracted so large a share of the attention of naval and military authorities in neutral countries, the United States commanders did not hesitate to cut the cables from Cuba and Manila to neutral territory, those cables, that is to say, over which they could not themselves control the dispatch of messages. The most significant thing is that no protest has been made by any neutral power against the cutting of these cables, and even a threatened protest by Spain apparently came to nothing. Moreover the events of this war, the only one in quite recent years in which naval hostilities on a fairly large scale have been carried on between two Western Powers, are likely to be cited in future as authoritative examples of the legitimate usages of maritime warfare.

Again, in the case of islands which can be completely isolated from the outer world by cutting all the cables round the coast, a belligerent might sometimes find this power useful as a means of offence as well as of defence, and any means of putting extra pressure on the enemy which is in itself humane, and yet may materially help to bring the war to a speedy close, ought not lightly to be taken out of the hands of a belligerent. The injury which might be caused to the commercial and other interests of neutrals by the cutting of a few very important cables must be kept in mind (it is well illustrated in an article in the *Times* of Dec. 7, 1885), but it can scarcely, even in these days of tenderness for the feelings of neutrals, be allowed a decisive weight in the settlement of a question of possibly vital importance to the belligerents.

If the right of a belligerent to cut cables be admitted, the question arises, where may he cut them? In a recent article in the Journal de droit international privé (1898, Nos. VII, VIII) Professor Holland has given the weight of his authority to the view that the

belligerent must not cut a cable running to his enemy's territory, except within the enemy's territorial waters, or at the most within the distance from the shore at which he might reasonably place a blockading squadron. 'The cutting,' he says, 'elsewhere than in the enemy's waters of a cable connecting enemy with neutral territory receives no countenance from international law.' Professor Holland seems to arrive at this conclusion by an application to submarine cables of the rules of international law which regulate warfare on land. If this application is legitimate, the conclusion, of course, is irresistible. But, with very great deference to Professor Holland's authority, I venture to suggest that the case is one for the application of the rules of maritime warfare, and that therefore it would be open to a belligerent to cut a cable beyond the limit of his enemy's territorial waters, just as it would be open to him to seize a dispatch boat on the high seas.

R. J. R. Goffin.

THE COMMONWEALTH OF AUSTRALIA BILL.

THE fact that the recent conference of colonial premiers at Melbourne has resulted in an agreement to again submit to the electors of the various colonies the same Commonwealth of Australia Bill which was voted on by them last June, with some modifications, not affecting (save for two exceptions) the constitutional scheme proposed, revives interest in its provisions. It will be remembered that last June the requisite majority of votes prescribed for adoption of the Bill was obtained in the case of Victoria, South Australia, West Australia, and Tasmania, while an absolute majority of votes in its favour was also obtained in New South Wales. The legislature of the last-named colony, however, had at the last moment resolved that a majority of not less than eighty thousand votes should be required to signify adoption, which number was not obtained; and inasmuch as the adherence of New South Wales to the scheme had been made a condition precedent to the Union, an effective halt was called and confederation for the moment thwarted. As, however, the objections of Mr. Reid and his New South Wales following, which related mainly to the financial system embodied in the Bill, and to the question of the location of the Federal Capital, appear to have been satisfactorily met, the adoption of the Bill on the next popular vote seems to be almost certain, and a comparison of the federal Constitution provided by it with that of Canada on the one hand and that of the United States on the other, will, I think, be found to be not without interest.

The Commonwealth of Australia Bill is in fact a most interesting attempt to combine the salient features of the British or rather of the Canadian Constitution, with those of that of the United States. There is a notable absence from the preamble of the Bill of any clause similar to that in the British North America Act, 1867, which contains the Canadian federal constitution, reciting that the colonies desire to be united with a constitution similar in principle to that of the United Kingdom,—a clause which Mr. Dicey, indeed, has designated as 'official mendacity[1],' or, at any rate, 'diplomatic inaccuracy[2],' even in the case of the Dominion, but which I hope the comparison I propose to make with the Australian scheme will go far to justify. One most important British feature, however, the

[1] Law of the Constitution, 3rd ed., p. 155. [2] Ibid., 4th ed., p. 156.

Australian Bill is careful to provide for, namely, responsible parliamentary government. The Governor-General may, by section 5, 'from time to time, by proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives.' The 'Queen's Ministers of State for the Commonwealth' not only may, but must by section 64, become either senators or members of the other House, for after the first general election no Minister of State shall hold office for a longer period than three months unless he does so. But in preferring the British system of Cabinet government to that separation of the executive from the legislature on which the 'Fathers' of the constitution of the United States, influenced largely by Montesquieu, laid such stress, the Australians are only agreeing with many modern American publicists, notably Mr. Woodrow Wilson, who in his 'Congressional Government' has made so strong an argument in favour of the British system. There is, however, one very peculiar provision in the Australian Bill in reference to this matter, which may be here noticed, namely (section 44), that 'any of the Queen's Ministers for a State,' i. e. for what the Canadians call 'a province,' shall be eligible as senators or members of the House of Representatives. If it is really contemplated that provincial Ministers shall sit in the federal parliament, this will be a striking departure from both Canadian and United States law and usage, though in neither of the latter cases do the constitutions expressly prohibit it; and I may also mention in this connexion that some two years ago Sir Wilfrid Laurier took a new departure in Canada by forming his government largely out of ex-premiers of different provinces.

Excepting, however, for the position of the Governor-General and the provisions for securing cabinet government on the British system, the rest of the Australian scheme bears a markedly American complexion, and it is a curious fact that whereas the Canadians living alongside of the United States endeavoured when confederating to reproduce British forms and principles rather than American whenever the two differed, the Australians have very largely preferred the latter. Their very terminology is American. The Canadians desired to call their united country the 'Kingdom of Canada,' but as Sir John Macdonald says in a letter to Lord Knutsford, published by Mr. Joseph Pope in his recent life of the former statesman, the name was changed from 'kingdom' to 'Dominion,' 'at the instance of Lord Derby, then Foreign Minister, who feared the first name would wound the sensibilities of the Yankees.' Whether the word 'Dominion' was suggested by the term 'the old Dominion' as applied to Virginia, I have not been able to ascertain; but it seems a pity that the Australians should

destroy the symmetry of things by preferring the word 'Commonwealth,' with its decidedly American flavour[1]. However, in like manner they prefer 'States' to 'provinces,' and most deplorable of all, as it seems to me, the term 'House of Representatives' to that of House of Commons, with all its honoured associations. But this matter of names is a trifle compared to the departure from the British system which we see in the Bill in respect to the Upper House. This is to be called the Senate as in Canada, but it is clearly framed after the Senate at Washington. The Canadians endeavoured to secure a Senate which should, so far as circumstances permitted, hold in the Dominion constitution a position analogous to that occupied by the House of Lords in Great Britain. They provided that its members should be summoned by the Governor-General in the Queen's name, and that they should hold their places for life, and imposed a property qualification of four thousand dollars over and above all debts; and while by the Federation Act the total number of senators is limited to seventy-eight, Ontario and Quebec are represented by twenty-four each, Nova Scotia and New Brunswick by ten each, Prince Edward Island by four, and British Columbia and Manitoba by three each; and in its relation to the House of Commons at Ottawa the Senate is bound by the same rules and conventions as govern that of the House of Lords to the House of Commons in England. On the other hand, under the Australian scheme (section 7), the 'original States,' which is defined as meaning such States as are parts of the Commonwealth at its establishment, are to be represented by six senators each, irrespective of their populations, just as the State of New York and the State of Rhode Island have an equal representation in the Senate at Washington, and, I may add, their seats are to be vacated by a similar system of rotation. And although it is provided that the Parliament may increase or diminish the number of senators for each State, the equal representation of the several original States is always to be maintained. Parliament may indeed (section 120) admit to the Commonwealth or establish new States, and may upon such admission or establishment make or impose such terms and conditions, including the extent of representation in either House of Parliament, as it thinks fit, and (section 123) a new State may be formed by separation of territory from a State, or by the union of two or more States or parts of States, with the consent of the Parliaments of the States or State affected. But there is no reason to suppose that the principle laid down at the commencement of the constitution of equal representation in the Senate of all the

[1] [There is good English precedent in Sir Thomas Smith's Commonwealth of England, written *temp.* Elizabeth, therefore free from suspicion of republicanism.—Ed.]

States will be in such case departed from. Consequently the position of the Australian Senate in relation to the House of Representatives, like that of the Senate at Washington, must be very different from that of the House of Lords or the Canadian Senate to the English or Canadian House of Commons, by reason of its peculiar status as representing pre-eminently the federal element in the constitution. Moreover, the Australian Senate is to be even more democratic in its constitution than the American Senate. The qualifications of a senator (section 16) are to be the same as those of a member of the House of Representatives, and instead of their being elected by the various State legislatures as in the United States, they are to be directly chosen (section 7) by the people of the State electing them, and (section 8) the qualification of electors is to be the same as that of electors of members of the House of Representatives. In the provision, however, that the senators are to be directly elected by the people instead of by the legislatures, the Australians are merely following the more modern American opinion, for on May 14 last the House of Representatives at Washington voted by 184 to 11 in favour of an amendment to the constitution providing for such direct election of senators. There is, however, an entirely original provision with regard to the Senate in the Australian Bill still to be noticed, of a very democratic character. For it is provided (section 57) that if the two Houses cannot agree upon any proposed law, and if after three months interval the House of Representatives again passes the proposed law and the Senate again refuses to agree to it, the Governor-General may dissolve both Houses; and if after such dissolution the House of Representatives again passes the same law and the Senate again rejects it, the Governor-General may convene a joint-sitting of the members of the two Houses, and if the proposed law be then affirmed by three-fifths of the members present and voting thereon (or as it is reported the colonial premiers have agreed at their recent conference, by an absolute majority of the members of both Houses, which is one of the exceptions to which I referred at the commencement of this article[1]), it shall be taken to have been duly passed by both Houses of Parliament. So that it will be easily seen that whatever the future constitutional developments in Australia may be with regard to the relation between the two Houses of the Federal Parliament, it cannot be expected to correspond with that between the two Houses in Great Britain or in Canada, and Canadians certainly have never had cause to regret that they so framed their scheme of confederation as to share in the forms and development of British constitutional liberty. One can only hope

[1] The other has reference to the provisions as to amending the constitution.

that the Australians will be equally satisfied with the working of their own system.

Passing now from the character of the Federal Parliament to the important matter of the distribution of legislative power between that parliament and the various State parliaments under the Australian scheme, we find that they have again followed the method of the constitution of the United States in preference to that of the Dominion of Canada. Under the United States constitution the only powers granted are those which are vested in the Congress of the United States, and for the rest it is expressly provided that 'the powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people[1].' As Sir John Macdonald, then Attorney-General, stated in introducing the confederation scheme before the legislature of the old province of Canada: 'They declared by their constitution that each State was a sovereignty in itself, and that all the powers incident to a sovereignty belonged to each State, except those powers which by the constitution were conferred upon the general government and congress.' The Canadians, anxious to avoid any such difficulties in respect to State Rights as had caused so much trouble among their neighbours, adopted a different system. They assigned to the provinces certain enumerated, though exclusive, powers only, though they added what may be called a residuary gift of power to make laws in relation to 'all matters of a merely local or private nature in the province[2].' On the other hand, they not only gave the Dominion Parliament exclusive power to make laws in relation to twenty-nine subjects of broad national concern, but they also gave to it a general power to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the provinces[3]. Thus, as Sir John Macdonald said in the speech I have already referred to, they provided 'all the advantages of a legislative union under one administration, with at the same time guarantees for local institutions and for local laws.' The framers of the British North America Act could not of course create a legislature precisely similar to the British Parliament in respect to supreme control over all matters whatever in Canada, because they were bringing into existence not a complete legislative union, but a federal union of the provinces, but they adhered as closely as possible to the British system in preference to that of the United States, as promised in the preamble of the Act. They distributed all legislative power whatever over the internal affairs of the Dominion

[1] Amendments, Art. X. [2] B. N. A. Act, 1867, s. 92. [3] Ibid., s. 91.

between the federal parliament on the one hand and the provincial legislatures on the other, and they provided that the respective powers of those bodies should be not concurrent, but exclusive, in each case, the one of the other, thus making each supreme in its own domain, though in the course of legal decision it has been determined that the Dominion Parliament by necessary implication must when making a law upon the broad general subjects assigned to it have power to deal with matters otherwise assigned to the provincial legislatures so far as such law may affect them, and also that in the event of direct conflict of legislative enactment, Dominion legislation if *intra vires* will place in abeyance that of a province. On the other hand, under the United States system, the powers of Congress are not expressed to be given to it exclusively, and are not construed as exclusive, unless from the nature of the power or from the obvious results of its operations a repugnancy must exist so as to lead to a necessary conclusion that the power was intended to be exclusive, otherwise the true rule of interpretation is that the power is merely concurrent. The Melbourne Convention has strictly followed the American example. The only powers (section 51) they have granted by the constitution are granted to the federal parliament, though those powers are extremely broad in their scope, and are far more numerous than those granted to the federal legislature either in the United States or in Canada. But they are not granted exclusively, nor is any general power of legislation similar to the Canadian conceded. For the rest, it is provided that (section 105) 'the constitution of each State of the Commonwealth shall, subject to this constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the constitution of the State'; and that (section 106) 'every power of the parliament of a colony which has become or becomes a State, shall, unless it is by this constitution exclusively vested in the parliament of the Commonwealth or withdrawn from the parliament of the State, continue as at the establishment of the Commonwealth or as at the admission or establishment of the State, as the case may be'; and that (section 108) 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall to the extent of the inconsistency be invalid.' But although the scheme is thus the same as that of the United States constitution, it may well be hoped that the separate Australian colonies having never enjoyed the same measure of independent sovereignty that the various States of the Union had for a period prior to the formation of their federal system, no serious difficulties will arise

in the matter of State Rights, especially as of course the whole arrangement must remain subject to the paramount authority of the Imperial Parliament, and it may be expected to have the advantage, which at any rate may be claimed for the United States constitution, that far fewer questions will arise for legal determination as between federal and State legislative powers than have arisen under the Canadian arrangement.

An integral part of the scheme of the Canadian constitution in respect to the distribution of legislative power is the federal veto power which there exists [1] and is vested in the Governor-General in Council, and is constantly exercised where provincial legislation is thought to conflict with Dominion laws, policy, or interests. But just as the framers of the Australian constitution have followed the American and not the Canadian scheme in regard to legislative power, so they have also followed it by not vesting any federal veto in the Governor-General. No doubt the provision to which I have already referred, as to the constitution of each State of the Commonwealth continuing, implies that Governors of the various States will continue to be appointed for the present by the Queen under the advice of her Imperial ministers, whereas in Canada the Lieutenant-Governors of provinces are under the constitution appointed by the Governor-General [2], and of course the Acts of the various State parliaments in Australia will continue to be subject to the Imperial veto, but that is only exercised for the protection of Imperial interests and obligations, and it cannot be contemplated that it shall be exercised hereafter for the protection of the federal interests of the Commonwealth. Perhaps the framers of the Australian Constitution have considered that, owing to the very numerous and wide powers which they have vested in the Federal Parliament and the provision which I have referred to that if a State law is inconsistent with a federal law the latter shall prevail, they could safely dispense with a federal veto. And, indeed, Professor Dicey has pointed out in his lectures upon the law of the constitution that the imperial veto of colonial Acts is now virtually represented by the power of control of the Imperial Parliament. 'It is,' he says, 'virtually, though not in name, the right of the Imperial Parliament to limit colonial legislative independence and is frequently exercised [3].' There are also indications in the Australian scheme, I think, of greater jealousy of federal powers than appears in the Canadian scheme, and indeed in a private letter of the Hon. Alfred Deakin, formerly Premier of Victoria, published in the Toronto papers of November 30 last, the existence of this jealousy is stated

[1] B. N. A. Act, 1867, s. 55.
[2] B. N. A. Act, 1867, s. 58.
[3] Law of the Constitution, 3rd ed., pp. 107–8.

as the explanation of the leaning towards the United States plan; and the framers of the Commonwealth Bill may have supposed that by omitting a federal veto power they were leaving greater freedom of action to the State legislatures. The judgment of the Judicial Committee of the Privy Council, however, in the important Canadian constitutional appeal of *The Bank of Toronto* v. *Lambe*[1], indicates that this may not be the case. In that judgment their Lordships refer to the very distinction between the United States constitution and the Canadian with which I am now concerned, and speak as follows:—

'Under the United States constitution, as their Lordships understand, each State may make laws for itself uncontrolled by the federal power, and subject only to the limits placed by law on the range of subjects within its jurisdiction. In such a constitution Chief Justice Marshall found one of those limits at the point at which the action of the State legislature came into conflict with the power vested in Congress. The appellant invokes that principle to support the conclusion that the Federation Act must be so construed as to allow no power to the provincial legislatures which may by possibility, and if exercised in some extravagant way, interfere with the objects of the Dominion in exercising their powers. It is quite impossible to argue from the one case to the other. Their Lordships have to construe the express words of an Act of Parliament which makes an elaborate distribution of the whole field of legislative authority between two legislative bodies, and at the same time provides for the federating provinces a carefully balanced constitution, under which no one of the parts can pass laws for itself except under the control of the whole acting through the Governor-General. And the question they have to answer is, whether the one body or the other has power to make a given law. If they find that on the due construction of the Act a legislative power falls within section 92' (i. e. the section which confers the provincial powers), 'it would be quite wrong of them to deny its existence because by possibility it may be abused, or may limit the range which would otherwise be open to the Dominion parliament.'

Thus it appears that partly owing to the federal veto power in the Canadian constitution, and partly owing to the fact that under that constitution certain express powers of legislation upon specified subjects are conferred upon the provincial legislatures exclusively, and which they therefore hold by the same right as the Dominion Parliament holds its powers, the provincial power to legislate upon those specified subjects cannot be denied, as in the case of the American States, merely because in doing so they may interfere with or restrict the range of federal legislation. There can be no doubt, I think, that if the United States principle is to be applied

[1] 12 App. Cas. 575.

to the Australian federal parliament with the immense range of subjects upon which it is given power to legislate, its control of State legislation will become more and not less extensive than that of the Dominion parliament over provincial legislation in Canada.

Moreover, the constitutional history both of the United States and of Canada have very forcibly illustrated to how great an extent the actual working and operation of a written constitution may diverge from its literary theory. Mr. Woodrow Wilson's little book on Congressional Government, to which I have already referred, is mainly occupied with explaining how largely congress has absorbed all public powers and over-ridden the checks and balances of the constitution; while, on the other hand, the recent matter of the Manitoba Public Schools has clearly shown how the exercise of constitutional powers undoubtedly conferred upon the Dominion Parliament by the British North America Act may prove quite impossible in the face of strong provincial adverse sentiment.

Lastly, in regard to a system of federal courts the Australian constitution is framed upon the American, and not upon the Canadian plan. Just as the constitution of the United States provides that 'the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish,' so the Australian Bill provides (section 71), 'the judicial power of the Commonwealth shall be vested in a federal Supreme Court to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.' The justices of the High Court (section 72) are to be appointed by the Governor-General in Council, and shall not be removed except by the Governor-General in Council on an address from both Houses of Parliament in the same session praying for such removal 'on the ground of proved misbehaviour or incapacity.' As in the United States, the federal judicial power is to extend (section 75) to all matters arising under any treaty, or affecting consuls or other representatives of other countries, or in which the Commonwealth or a person suing or being sued on behalf of the Commonwealth is a party, or between States, or between residents of different States, or between a State and a resident of another State. And (section 76) Parliament is given power to confer on the High Court original jurisdiction in any matter 'arising under this constitution or involving its interpretation,' or 'arising under any laws made by the Parliament,' or 'of admiralty and maritime jurisdiction.' Parliament may, however, (section 77) make laws investing any Court of a State with federal

jurisdiction, and there is also jurisdiction given to the High Court (section 73), subject to such exceptions as Parliament may prescribe, to hear appeals from all judgments of the Supreme Court of any State, or of any Court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council. This elaborate and expensive system of federal courts as distinguished from State or provincial courts is avoided under the Canadian scheme. There the only federal courts are the Supreme Court of Canada and the Exchequer Court at Ottawa, the latter of which deals with claims against the Crown and revenue cases, while the former exercises appellate jurisdiction over the latter, and also over all provincial courts of last resort, a system which has been found to work smoothly and well. But the British North America Act contained no provision interfering with the Queen's prerogative right to hear appeals from all colonial courts before the Judicial Committee of her Privy Council. On the other hand, the Australian scheme especially provides that (section 74) 'no appeal shall be permitted to the Queen in Council in any matter involving the interpretation of this constitution or of the constitution of a State, unless the public interests of some part of Her Majesty's Dominion, other than the Commonwealth or a State, are involved.' All I would say with regard to that provision is that the Canadians would have had much cause to regret it if any such provision had been contained in their constitution; for the work that has been done in construing and elucidating the latter and developing its underlying principles by such men as Sir Montague Smith and Lords Shand, Watson, Herschell, and Davey, sitting as members of the Judicial Committee, has been invaluable.

The above, then, are the considerations which seem to present themselves with regard to the broad features of the Australian scheme. Many interesting matters of detail, however, in the Bill remain to be noticed, which I shall hope for permission to do in another article.

A. H. F. Lefroy.

MORTGAGEES AND TRADE FIXTURES.

THE general rule of law with regard to fixtures is that whatever is fixed to the freehold becomes part of it, and is subject to the same rights of property as the land itself. The first notice of this rule in Roman law is found in Gaius: 'Praeterea id quod in solo nostro ab aliquo aedificatum est, quamvis ille suo nomine aedificaverit, iure naturali nostrum fit quia superficies solo cedit[1].' In English text-books the rule is given in the form of the maxim 'Quidquid solo plantatur solo cedit.' This maxim obtained almost universal recognition at a time when little heed was paid to rights other than those of owners of land. 'The old cases on the subject leant to consider as realty whatever was annexed to the freehold by the occupier; but in modern times the leaning has always been the other way in support of the interests of trade, which is become the pillar of the state[2].' The reason which induced the Court to relax the old rule of law, and to admit an exception in the case of chattels fixed to the soil for the purposes of trade, was that the commercial interests of the country might be advanced. In course of time the term 'trade fixtures' became well known in English law, and there is a large body of law dealing with the respective rights of heir-at-law and executor, of tenant for life and remainderman, and of tenant for years and reversioner in respect of chattels fixed to the freehold for the purposes of trade. It is obvious that often the commercial value of a building depends upon the trade fixtures contained in it. The building with the fixtures is a valuable asset. The building without the fixtures is in many cases worth little or nothing. If a mortgagee advances his money on the security of a building or property used for the purposes of trade, and containing or likely to contain trade fixtures, it is of vital importance to know whether his security does or does not comprise the trade fixtures. Not unnaturally this question has come before the Courts on several occasions in recent years, and it is to be feared that in attempting to do justice between the parties in the particular case before them, the judges have used language and laid down propositions which, when applied to other circumstances, tend to cause absolute injustice. A discussion of the more important of the recent cases will show how far it is

[1] Institutes, Bk. II. pl. 73.
[2] Per cur. in *Penton* v. *Robart* (1801) 2 East, 88; 6 R. R. 376.

possible to deduce any general propositions embodying the results of the decisions. 'It is of great importance that the law as to what is the security of a mortgagee should be settled[1].'

Prima facie in the case of a mortgage of property all things which are annexed to the place are part of the mortgage security, and therefore the mortgage deed need not, and often does not, contain any mention of fixtures. The trade fixtures are transferred not as fixtures, but as part of the land. It was at one time supposed that though this was the case with regard to a mortgage in fee of freehold land, the rule was different in the case of a mortgage by demise. This error was founded on an *obiter dictum* by Blackburn J. in *Hawtry* v. *Butlin*[2]. The decision in that case depended on the construction of the Bills of Sale Act, 1854. But in the course of his judgment Blackburn J. said, '*Holland* v. *Hodgson*[3] and *Mather* v. *Fraser*[4] show that where land is mortgaged in fee with fixtures upon it, such as a tenant for years, if the land were leased, might remove at the end of the term, the fixtures pass with the conveyance of the land, because upon the mortgage in fee they are to be deemed to be part of the land. But when a person has a limited interest in land, such as a term of years, and on the land there are fixtures in which he has an absolute property, and he mortgages his interest in the land by way of underlease, I should think that the property in the fixtures would not pass by the mortgage, and the right to sever them would still remain in the mortgagor, unless there is a clear intention in the mortgage deed to pass the absolute interest in the fixtures as well as the limited interest in the land.' This dictum was dissented from in *Southport and West Lancashire Banking Company* v. *Thompson*[5]. The Court of Appeal in that case held that no distinction could be founded on the fact that the mortgaged land was leasehold and not freehold, but that whether the property was freehold or leasehold, the mortgage deed would transfer to the mortgagee the fixtures fixed on the land or in the buildings; but that in the case of a mortgage of leasehold property, the property of the mortgagee in the fixtures would cease at the same time as his interest in the land ceased.

If this were the only rule the matter would be quite simple, and a creditor who has taken a mortgage in fee of freehold property would know that he was the owner (subject to redemption) of both the freehold property and the trade fixtures upon it, and a creditor who has taken a mortgage by demise of leasehold property would know that he was the owner (subject to redemption) of both the

[1] *Holland* v. *Hodgson*, 1872, L. R. 7 C. P. p. 372.
[2] 1873, L. R. 8 Q. B. p. 293.
[3] 1872, L. R. 7 C. P. 328.
[4] 1870, L. R. 5 Q. B. 123.
[5] 1887, 37 Ch. D. 64.

leasehold property and the trade fixtures upon it during the term mentioned in his mortgage. But subsequent decisions have made a mortgage a very precarious security so far as fixtures are concerned.

In *Sanders* v. *Davis*[1] the facts were firstly a mortgage in fee of freehold property, secondly a demise by the mortgagor to a yearly tenant, thirdly the placing on the land of trade fixtures by the tenant, fourthly the sale of the property included in the mortgage by the mortgagee, who had not recognized or adopted the tenancy of the tenant. The Court held that the purchase money received by the mortgagee in respect of the fixtures belonged to the tenant. This was no doubt a just decision on the facts of the case. It would have been hard to deprive the tenant of his fixtures, and the mortgagee had advanced his money on the security of the premises before the fixtures were placed on them. Manisty J. in giving judgment said, 'If the defendant (the mortgagee) had taken possession and let to Hunt (the tenant), and Hunt had brought trade fixtures on to the premises, he would have been entitled to remove them when his tenancy terminated. I cannot see why a mortgagee should be in a better position in this respect when he permits the mortgagor to deal with the property and let to a tenant. I think he must be taken to have known of the letting to Hunt, and to have acquiesced in it, and consequently he would not have been able to prevent Hunt from removing the fixtures.'

In the *Cumberland Union Banking Company* v. *The Maryport Hematite Iron and Steel Company*[2], the facts may be stated shortly as follows. In December, 1883, the defendants mortgaged a leasehold colliery by subdemise to the plaintiffs. The mortgage deed provided that the plaintiff's security should include all machinery and trade fixtures 'now standing or being, or hereafter to stand or be' upon the mortgaged premises. In July, 1889, the defendants entered into an agreement with a firm of engine makers named Simon and Luhrig respecting a coal washing plant to be erected at the mortgaged colliery. The plant was duly erected, and, according to the agreement, was to be paid for by monthly instalments; until fully paid for the plant was to remain the property of Simon and Luhrig. The mortgagees were not parties to and had no notice of this agreement. In August, 1890, the plant commenced working, and the defendants paid two monthly instalments in respect of the purchase money, and no more. In February, 1891, the defendant company were ordered to be wound up. Simon and Luhrig claimed as against the mortgagees that the plant remained their property under the agreement of July, 1889.

[1] 1885, 15 Q. B. D. 219.

[2] '92, 1 Ch. 415.

The mortgagees claimed the plant by virtue of their mortgage. North J. decided the question in favour of Simon and Luhrig. He said, 'It was not in the power of the mortgagors to confer upon their mortgagees a better title than they themselves had to the property which they agreed to mortgage to them. The mortgagors cannot be heard to say that the machinery is not the property of Simon and Luhrig, and the banking company (their mortgagees) do not stand in any better position.' It follows that a mortgagee may refrain from taking measures to enforce his security in reliance on the value of trade fixtures which are brought on the demised premises by the mortgagor, and may find, when the insolvency of the mortgagor is apparent to all, that the trade fixtures are the property of a third party under an agreement of which the mortgagee had neither actual nor constructive notice.

In *Gough* v. *Wood*[1] the question was carried to the Court of Appeal on facts similar to the facts in the last case. It was argued for the mortgagee that the unpaid vendor of the trade fixtures derived his right to remove the fixtures from the agreement with the mortgagor, that the mortgagor had no right as against the mortgagee to remove the fixtures, and that therefore the mortgagor could not by agreement give to the unpaid vendor as against the mortgagee any right to remove the fixtures from the mortgaged premises. This was an ingenious attempt to turn the flank of the decision in the *Carlisle and Cumberland Banking* case. According to the decision in the former case, and the argument in this case, the mortgagor is midway between the mortgagee and the unpaid vendor. By the mortgage deed he has granted the fixtures to the mortgagee, by the agreement he has stated that the fixtures are the property of the vendor until all the instalments are paid. Has the mortgagee or the unpaid vendor the better right to the property? The Master of the Rolls acknowledged that the case raised a difficult question. Wright J., in the Court of first instance, appears to have decided the case with the epigram 'one man's property cannot be taken away from him by being fixed in the land of another.' The present Master of the Rolls pointed out that cases might be put in which this might happen. He quoted Brooke's Abridgment, Property, 23: 'If a piece of timber which was illegally taken from *J. S.* have been hewed, this action (i. e. trespass) does not lie against *J. S.* for retaking it. But if a piece of timber which was illegally taken have been used in building or repairing, this, although it is known to be the piece which was taken, cannot be retaken, the nature of the timber being changed; for by annexing it to the freehold it is become real

[1] '94, 1 Q. B. 713.

property.' The learned judge added: 'If I employ a builder to build me a house with bricks that are not his, I apprehend that they become mine, and that their former owner cannot recover them or their value from me. The old law expressed in the maxim "Quidquid solo plantatur solo cedit," though much relaxed since the days of the year-books, has not yet been replaced by the rule which prevents the owner of real property from granting a better title than he himself has.' The Court of Appeal decided the case on the ground that the mortgagee by leaving the mortgagor in possession of the premises gave him authority to hire and bring and fix fixtures necessary for his business, and to agree with the owner of them that he should be at liberty to remove them at the end of the time for which they were hired. Kay L.J. said, 'As the boiler and pipes were removed while the mortgagor was in possession, and was carrying on with the assent of the mortgagee a business for the purposes of which they were fixed, I think his licence may be held to extend so far as to permit the removal while that business was being carried on, and before the mortgagee put an end to it by taking possession.' The learned Lord Justice stated distinctly at the end of his judgment that the assent of the mortgagor to the removal of the fixtures must be implied from the fact of his not having taken possession of the premises before the removal. If there had not been this implied assent, the mortgagee would have succeeded in his claim for damages for the removal of the fixtures.

The decision in *Gough* v. *Wood*[1] was pronounced without any apparent hesitation by the judges in Court of Appeal. But in *Huddersfield Banking Company, Limited* v. *Lister & Son, Limited*[2] the matter was mentioned again by Lindley M.R. and Kay L.J. In the latter case the question was raised between mortgagors and mortgagees as to the proceeds of sale of certain machinery, which had been fixed in a mill of the mortgagors, but was detached from the freehold at the time when the mortgagees took possession of the premises. The main contest in the case was as to the right principles to be applied in an action to set aside a consent order, but in the Court of Appeal counsel for the mortgagors argued that inasmuch as the fixtures had been detached from the freehold before the mortgagees took possession of the premises, the mortgagors were entitled to the proceeds of sale, and they cited the *Cumberland Union Banking* case and *Gough* v. *Wood*. In repelling this argument Lindley M.R. said, 'Those cases turned on the view right or wrong—I do not pause to consider that now—that the chattels were unfixed, and properly unfixed, on the implied authority given by the mortgagees.' Kay L.J. was more emphatic: 'The cases of the *Cumberland*

[1] '94, 1 Q. B. 713. [2] '95, 2 Ch. 273.

Banking Company v. *The Maryport Hematite Iron and Steel Company*, and *Gough* v. *Wood*, were referred to as if the thirty-three looms had at one time been fixtures, yet before the mortgagees took possession the mortgagors had a right to remove them: as between mortgagors and mortgagees I simply dissent from that proposition, and if *Gough* v. *Wood* be examined it will be found that it proceeded entirely upon this, that from the circumstances of that particular case the mortgagees must be taken to have assented to what the mortgagors did in removing the fixtures before they took possession.' This later decision robs *Gough* v. *Wood* of any right to be cited as a leading case. At the stage now reached all that can be said is that there is no rule that the fact of the mortgagee having or having not taken possession of the mortgaged premises before the fixtures are removed is in all cases the decisive fact in the case. It is true that under certain circumstances the assent of the mortgagee to the removal of the fixtures can or may be implied from the fact that the mortgagor is still in possession at the time when the fixtures are removed.

The question is carried one step further by the decision of the Court of Appeal in *Hobson* v. *Gorringe*[1]. In that case the leading dates are as follows. In January, 1895, the gas engine in question in the action was let out on hire by the plaintiff Hobson to the mortgagor. The hiring agreement was in writing, and provided that if the hirer made any default in paying any of the moneys due under the agreement, the owner should be at liberty to take possession of the engine as if the agreement had not been made. The engine was affixed to the freehold, and carried a plate with the inscription 'This engine is the property of Wilfrid Hobson.' In July, 1895, an existing mortgage on the freehold was assigned to the defendant Gorringe, and the latter at the same time made a further advance to the mortgagor. In January, 1896, the mortgagor was adjudicated a bankrupt, and in March, 1896, the mortgagee took possession of the mortgaged premises, including the gas engine, which he found in its place. The Court of Appeal held that as between the owner of the engine under the hiring agreement and the mortgagee of the premises, the latter had the better right to the engine. A. L. Smith L.J., in giving the judgment of the Court, said, 'There can be no doubt upon a mortgage in fee of land that as between the mortgagor and mortgagee, the mortgagee is entitled to all fixtures which may be upon the land, whether placed there before or after the mortgage. . . . The case of *Gough* v. *Wood* in no way assists the plaintiff (the owner of the engine), and has no application to the present case. That case was

[1] '97, 1 Ch. 183.

decided solely upon the ground that the mortgagee had acquiesced in the removal by the mortgagor during his tenancy of trade fixtures. Even if in the present case a licence had been granted by Gorringe (the mortgagee) to King (the mortgagor) to remove the gas engine during the continuance of a term, neither of which conditions in fact existed, Gorringe by entering and taking possession of the land and engines would have determined the license.'

It is submitted that the view that the rights of the mortgagee to the fixtures can depend on the circumstance that he either has or has not entered into possession of the mortgaged premises is unsound. So long as the mortgagor pays the interest due on the mortgage regularly, the mortgagee will not wish to take possession. So long as the mortgagor pays the instalments due under a hiring agreement, the owner of the machinery has no cause to resume possession. But if the mortgagor fails to pay the interest on the mortgage or the instalments on the hiring agreement, then, as the case may be, either the mortgagee will take possession of the mortgaged premises or the owner of the machinery will remove it. Therefore according to the hypothesis it is in the power of the mortgagor to prefer either the mortgagee or the owner of the fixtures, and there is the possibility of collusion between two of the three parties to the prejudice of the third.

Further, the entry into possession of the mortgaged premises by the mortgagee may be purely accidental, so far as any assertion of a claim to fixtures is concerned, and may have occurred from quite other motives.

Lastly, it is surely inconvenient that the law should tolerate a scramble for priority between the mortgagee and the owner of the fixtures as soon as the insolvency of the mortgagor is disclosed. Nothing is less likely to conduce either to the security of mortgagees or to the efficacy of hiring agreements.

In delivering the judgment of the Court in *Hobson* v. *Gorringe*, A. L. Smith L.J. discloses another ground for preferring the claim of the mortgagee to that of the owner of the machinery[1]. 'In our opinion the engine became a fixture—i.e. part of the soil—subject to this right of Hobson (the owner), which was given him by contract. But this right was not an easement created by deed, nor was it conferred by a covenant running with the land. Neither could the right be enforced in equity against any purchaser of the land without notice of the right, and the defendant Gorringe (the mortgagee) is such a purchaser. The plaintiff's right to remove the chattel if not paid for cannot be enforced against the defendant, who is not bound either at law or in equity by the

[1] '97, 1 Ch. at p. 192.

contract contained in the hiring agreement.' This passage suggests that in the interests of the owners of chattels which are intended to be affixed to the freehold of the hirer, hiring agreements ought to take a form very different from their usual form, that they ought to be under seal, to create an easement on the premises to which the chattels are to be affixed, and to contain a covenant binding those premises in the hands of a purchaser or mortgagee with or without notice. There may be technical difficulties in the way of framing a hiring agreement that will affect this. But the passage seems to suggest a solution of the difficulty. It is hard to say whether it is more incumbent on the mortgagee who relies on the fixtures attached to the mortgaged premises to ascertain whether those fixtures are the property of the mortgagor or some one else, than it is on the owner of the chattels who allows them to be fixed to the land of another under a hiring agreement, to ascertain whether the land is in fact the property of the hirer or of some one else. If the Court will by a clear and unambiguous decision cast this duty either on the mortgagee or on the owner of the chattels, the parties will be able to make their arrangements accordingly. If the onus lies on the mortgagee, then the owner of the chattels will know that his hiring agreement is valid, and that his claims cannot be defeated by a mortgage of the premises of which he knows nothing, while the mortgagee will know that his security, so far as the fixtures are concerned, is precarious, and will arrange the terms and amount of his loan accordingly. If, on the contrary, the onus lies on the owner of the chattels, then he will be well advised to make provision by charging an additional sum in the agreement for the possibility of the fixtures being claimed by a mortgagee. In either case the parties would know that their rights were regulated by an intelligible rule of law, and that is one of the main points to be considered.

ERNEST C. C. FIRTH.

ENGLISH JUDGES AND HINDU LAW.

Second Paper.

IN the year 1781 the right of the Hindu and Mahomedan inhabitants of British India to regulate their lives and properties by their own law was recognized by an Act of the Imperial Parliament, and that right has since been repeatedly affirmed and reaffirmed by Acts of Parliament, Acts of the Indian Legislatures, and the Charters of the High Courts. The Queen's Courts in India and the Judicial Committee of the Privy Council are therefore under the obligation to administer Hindu Law to Hindus and Mahomedan Law to Mahomedans, and have done so successfully where they have been able to ascertain what the Hindu or Mahomedan law on the subject in question really was. But the difficulty for an English judge, who knows nothing of Sanscrit and has had no experience of India, to ascertain what the Hindu or Mahomedan law is, must always be very great, and though the works of Hindu and Mahomedan writers and the industry of Sanscrit and Arabic scholars, both European and Indian, have, in recent years, placed a large amount of information within the reach of students of Eastern law and custom, which was not before accessible to them, there is reason to fear that some of the decisions of the Judicial Committee, which are binding on all the Courts in India, are not in accordance with the law by which Hindus and Mahomedans regulate their lives.

The object of this paper is to endeavour to illustrate this, and to call attention to the evils which do and must result from it.

The cherished institution of the Hindus is the joint family, and upon it their entire social system turns. The institution is divided into two main sections. The larger of these may be described as containing the joint families regulated by the Mitakshara or the Benares school, and is the normal condition of Hindus over the whole of India except Bengal. The other, which may be described as containing the families regulated by the Dayabhaga, or the Bengal school, is the normal condition of all Hindus who are members of families which have their origin in Bengal. There are several subdivisions of those families which are subject to the Benares school, but for the purpose of this paper they may all

be treated as regulated by one set of rules or customs. The Mitakshara, which is the book on which the Benares school founds itself, is a running commentary by Vijnanesvara on the Institutes of Yajnavalkya, the date of which is not very certain, but which Sir Raymond West and Professor Bühler place at the latter half of the eleventh century. A description of the book, and of the Institutes of Yajnavalkya, will be found in their book on Hindu Law at the beginning of the first volume. Mr. Morley says the Dayabhaga is the chapter on inheritance of the Dharma Ratna of Jimuta Vahana, which is a digest of the law according to the Gauriya school. It is described in Morley's Digest, Vol. I, and, in the opinion of Pandit Siromani of Nadiya, was written in the fifteenth century. In Mitakshara families ancestral properties belong to the family, every member of which gains an interest in them by birth, which entitles him or her to be maintained in the family so long as it remains joint, and entitles each male member of the family to receive a separated share upon a partition. There is a difference of opinion as to whether all or only a portion of the possible male members would be entitled to a share on partition, but the statement made above is sufficiently accurate for the purposes of this paper. In Dayabhaga families the ancestral as well as the self-acquired properties belong to individuals and descend upon the death of the owner to his descendants, or to the persons who according to the law of the school happen to be his heirs at the time of his death. This paper is concerned only with the families of the Mitakshara or Benares school.

As has been said before, the joint family is the cherished institution of the Hindus. It is the institution which has enabled them to exist for ages without either a poor law, or public hospitals, or charitable institutions; and one of the most curious things in the history of the administration of Eastern Law by European judges has been the persistent way in which they have attacked this particular institution, in the interest of the money-lenders, in precisely the same way that they have attacked the Mahomedan families in India, in the interest of the same money-lenders, by refusing to recognize the Mahomedan family settlements, which are known as Wukfs, and by means of which Mahomedans, in all countries, are accustomed to protect their properties. The most recent Hindu writer on the subject is Baboo Golapchandra Sarkar, a vakil of the Calcutta High Court. Writing in 1897 he says: 'A student of jurisprudence would be at a loss to understand the principle on which the highest tribunals are changing the Mitakshara law which they are called on to administer. Hindu law, as it is, seems to be suited to the exigencies, and is conducive

to the welfare and well-being of Hindu society; and the introduction of an innovation like the legal liability of the son to pay off his father's debt, has been attended with mischievous consequences entailing great hardship. The Indian money-lenders are shrewd and astute enough to be able to protect their own interests, while men of property here are often surrounded by unprincipled servants and hangers-on who feel no compunction in robbing their masters and benefactors in collusion with money-lenders. By the operation of the doctrine introduced by the Privy Council in *Girdhari Lall's* case many ancient families are becoming ruined and reduced to poverty. But while the Judicial Committee is changing the law for the benefit of creditors, the Indian Legislature is passing enactment after enactment for the protection of the people against money-lenders.'

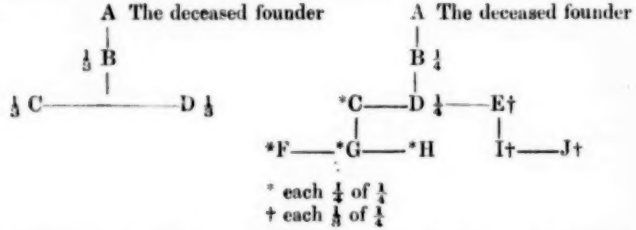
It may not be quite accurate to say that the Indian Legislature is passing enactment after enactment for the purpose, but it is undoubtedly true that for years the Indian Legislatures and the Judges of the High Courts have been, in vain, trying to invent some scheme which would give back to the landowners some portion of the protection of which the Judicial Committee has deprived them.

I will now endeavour to ascertain what are the incidents of a joint Mitakshara family, according to the opinions of Hindus themselves, and to trace the steps by which the Judicial Committee have produced the state of things which at present exists.

A joint Mitakshara Hindu family consists of the male descendants of a common ancestor, any males who have been adopted by members of the family, and the wives, widows, and unmarried daughters of the male members, all of whom are living as a joint Hindu family and none of whom have separated from the others. The joint property of such a family consists of (1) ancestral property, i.e. property which has descended from a lineal male ancestor; (2) accretions to such ancestral property; (3) acquisitions by joint exertion or by joint funds and (4) self-acquired property which the acquirer has thrown into the common stock. Any member of the joint family may be the owner of separate property, that of a female member being what is called Stridhana, that of a male member being his self-acquired property or that which he has inherited, in the ordinary sense of the word inherited.

So long as the family remains joint, every child who is born into it acquires on its birth an interest in the ancestral property of the family, which entitles him, or her, to be maintained in the family as long as it remains joint, and, in case of a separation would entitle each male member, who was in existence at the time,

to have a separated share of the ancestral property allotted to him. The amount of such share would depend on the number of members of which the family consisted at the time of partition, and on their relationship to each other. The descendants of sons would take their shares by families and not by heads. In the following examples the members of the family would, if the ancestral property were divided, take the shares shown:—



So that on a partition each male member of each branch including the head of the branch would take the same share. In November, 1866, Lord Westbury in giving the judgment of the Judicial Committee in *Approvier's* case (2 Moore, Indian Appeals 88) described a Hindu family of the Mitakshara school. His description has always been accepted by Hindus as accurate, and it is very much to be regretted that it was not more complete. He said:—

'According to the true notion of an undivided family in Hindu Law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property that he, that particular member, has a certain definite share. No individual member of an undivided family could go to the place of the receipt of rent, and claim to take from the collectors or receiver of the rents a certain definite share. The proceeds of the undivided property must be brought, according to the theory of an undivided family, to the common chest or purse and then dealt with according to the modes of enjoyment by the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property that it shall henceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment is taken away from the subject-matter so agreed to be dealt with, and in the estate each member has thenceforth a definite and certain share, which he may claim the right to receive and to enjoy in severalty, although the property itself has not been severed and divided.'

It appears then that the rights of the members of an undivided Mitakshara Hindu family in the ancestral property of the family are clear and easily understood. So long as the family

remains joint and undivided each member has the same right in the property, i.e. the right to be supported as a member of the family, in the family, by the income of the entire property, in the case of the males and their wives for life, and the case of daughters until marriage; with the added right, that all male members, or at least all male members who are within four degrees of descent from the existing head of the family, may compel a partition of the family property, and upon such partition would obtain the absolute ownership of a share of the corpus, instead of a life interest in the entire income.

The Mitakshara contains these texts. 'If the father is dead or gone to a distant place (and not heard of for twenty years) or laid up with an incurable disease, his sons and sons' sons shall pay his debts which must be proved by witnesses in case of denial.' 'He who takes heritage, likewise he who takes the widow, or a son, if the estate is not vested in any one else, or the heirs of one leaving no son, shall be compelled to pay the debts.' 'A son is not liable for his father's debts incurred for indulgence in wine, women, or wager, or for unlawful fines, or tax imposed on him, or for his promise to make an unlawful gift.' These texts are binding on all Hindus to whatever school they may belong, and it should be noticed that they create two distinct obligations. One, a personal obligation, binding on sons and grandsons only, which is entirely independent of anything they may receive from the debtor's estate. The other, an obligation on any person who may inherit any portion of the debtor's estate, to pay his debts to the extent of any assets which may come to his hands.

Now it is quite certain, as every Hindu knows, that the mandate to sons and grandsons to pay the debts of their ancestor is entirely in the interest of the ancestor, and not in any sense in the interest of the creditor. The reason for the mandate is that a debt, left unpaid at the death of the debtor, is, according to the religion of the Hindus, a sin for which the debtor will be punished in a future life, and the sons and grandsons of the debtor are ordered to pay his debts, when he is dead, in order to save him from that punishment, in which the Hindus have a real and not an imaginary belief. It is equally certain that every Hindu who is a lawyer knows that the duty rests on the son and grandson only, and that a great-grandson or remoter descendant is under no obligation to pay his ancestor's debts, and that there is no kind of obligation on any one to pay the debts of an ancestor during his life. Also, it is almost certainly the case that until the text had been found by English lawyers and they had supposed that it was a rule of law promulgated by a competent lawgiver, in the interest

of creditors, and had given effect to that view, it had always been looked upon by Hindus as a religious and not a legal obligation. If it were worth while to pause for the purpose it would be easy to cite authorities in support of these assertions, and it may be worth while to say here, that, before publication, these papers have been seen and approved by some of the Hindus in India who are most qualified by learning and experience to know if they correctly represent Hindu feelings and usages.

In July, 1856, the judgment of the Judicial Committee was delivered by Lord Justice Knight Bruce in the case of *Hanooman Pershad*, 6 M. I. A. 393, and it is upon a passage in that judgment that the attack upon the Mitakshara family has been based. The Lord Justice was considering whether there was any consideration to support a charge created by the manager upon the estate of an infant Hindu of this school, and in the course of his remarks on this question he said:—

'And as to the whole charge, there is also at least *prima facie* evidence, by admissions of the plaintiff, proved by several witnesses uncontradicted on the point. As to the debt of the ancestor, it has been said that it was already secured, and that the estate being ancestral could not, according to the law current in the North-West Provinces, be charged in the hands of an heir for an ancestor's debt. But it is to be observed, as to the change of security, that there was a reduction of interest, and it is therefore a transaction *prima facie* for the benefit of the estate, and though an estate be ancestral it may be charged for some purposes against the heir, for the father's debts, by the father, as indeed the case above cited from the sixth volume of the Decisions of the Sudder Dewanny Adavlat North-Western Provinces incidentally shows. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law, the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate, whether ancestral, or acquired by the creator of the debt.'

This quotation has been inserted here as it shows two things —first, how slight a foundation it affords for the edifice which has been erected on it, and, second, what a very incomplete knowledge of the Hindu law was possessed by the Lord Justice, who evidently supposed that in a Mitakshara family the ancestral estate descended from father to son, as it does in a Dayabhaga family, but that the estate of the father in the hands of the son would not be liable to answer debts of the father which had been incurred for improper purposes. Both these suppositions are incorrect. The ancestral estate in a joint undivided Mitakshara

family does not descend from father to son, but both fathers and sons have an equal interest in it during their joint lives, and any estate which absolutely belonged to a Hindu, of any school, would be liable to pay his debts, all over India, in the hands of his heirs, whether his heirs were his sons or grandsons or any one else, and whatever was the character of the debt, unless of course it was one which could not have been enforced against the debtor himself in an ordinary court of law.

Notwithstanding this judgment, the Courts in India continued to deal with the rights of the various members of Mitakshara families in the ancestral property according to the law of that school, down to the year 1874, but in the month of May of that year the Judicial Committee created a new law for the regulation of such families, and, by it, placed a member of a Mitakshara family, in his relations to his own descendants, in the same position as that which he would have held had they been members of a Dayabhaga family. This was the judgment which was delivered by Sir Barnes Peacock in *Girdhari Lall's* case, 1 I. A. 321.

In this judgment it is laid down, as a principle of the Mitakshara school of Hindu law, that a sale or mortgage by a member of a Mitakshara family, who had descendants living at the time, of the ancestral property for his own private personal debts, if they are not incurred for immoral purposes, will pass the whole interest of himself and his descendants in the ancestral estate, because it is the pious duty of sons to pay the debts of their father. This judgment quotes a portion of the judgment of Lord Justice Knight Bruce which has been already quoted in this paper, and proceeds, 'That is an authority to show that ancestral estate which descends to a father under the Mitakshara law, is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son, and it being a pious duty on the part of the son to pay his father's debts, the ancestral property, in which the son, as the son of his father, acquires an interest at birth, is liable to the father's debts.' The rule is, as stated by Lord Justice Knight Bruce—'The freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt, and not to the nature of the estate, whether ancestral or acquired by the creator of the debt.'

The reasoning of this judgment is very obscure, and from the words used it is impossible to ascertain whether the committee intended to hold that the son's property was answerable for the father's debt because the son was under a personal liability to pay it, or whether they thought that any interest which the son could ever obtain in the ancestral property must descend to him from his

father because he was his father's heir. The first proposition would involve a decision that the personal obligation of the son is a binding legal obligation, which can be enforced by the creditor, and that it is a legal, personal obligation binding on the son in the lifetime of the father, in the same way as the debt itself is binding on the father, the debtor. The second proposition would involve a decision that any interest which a man can ever gain in the ancestral property of the Mitakshara family of which he is a member, must devolve on him at his father's death and as his father's heir. In other words, that the property belongs to the father as long as he lives, and that the difference between Mitakshara and Dayabhaga families is merely nominal. The Committee have never affirmed either of these propositions in so many words, but one phrase in his judgment would seem to hint that Sir Barnes Peacock would have been prepared to affirm the latter; and a subsequent judgment of his, which will be presently noticed, would seem to indicate that such was his opinion. In July, 1877, the Judicial Committee, by a judgment delivered by Sir James Colville, refused to consider the question, whether the whole interest of a father and his sons in ancestral property could be sold for the debt of the father, because the sons had not been made parties to the suit; but held that the purchaser could compel the partition which the debtor himself could have compelled, had he been so minded, before the alienation of his share. (*Deendyal's* case, 3 Cal. 198.)

In the month of February, 1879, the question was again before the Committee in *Suraj Bansi Kuar's* case (5 Cal. 148), when the judgment was again delivered by Sir James Colville. In this judgment the Committee, on the authority of *Girdhari Lall's* case, affirmed the proposition, that where ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, his sons by reason of their duty to pay their father's debts, cannot recover the property, unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted. In this judgment Sir James Colville adds: 'The rights of the coparceners in an undivided Hindu family governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those in a like family which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts which the Hindu law imposes upon sons.'

This sentence would seem to indicate, that, although Sir James Colville was constrained to follow the decision in *Girdhari Lall's* case, he did not think that, in a Mitakshara family, a son took

his interest in the ancestral property of the family as heir to his father.

These decisions created a great feeling of alarm and dissatisfaction in India, and quite a little crop of protests against them appeared all over India. In Bombay, Vishvanath Mandlik, in his translation of the Vyavahara Mayukha and the Yajnavalkya Smriti, stated the Hindu law of the Mitakshara very clearly, and cited the authorities on the subject. In the same presidency, Sir Raymond West and Professor Bühler, in their book on Hindu law, expressed their opinion in terms which may be almost described as indignant. In Bengal, some of the judges endeavoured to explain away the decisions, so as to bring them into harmony with what they quite well knew was the Hindu law on the subject, but, in the end, were told by a decision of a full bench that they must follow the law of the Judicial Committee. In Bengal too, Pandit Siromani of Nadiya, in his Commentaries on Hindu Law published in 1885, and Baboo Golapchunder Sirkar in 1895, discussed the whole question, and showed what the Hindu law is, and how different it is from the law of the Judicial Committee. In 1885, Baboo Krishna Kamal Battacharyya, a vakil of the Calcutta High Court, in the Tagore law lectures for that year, apologized for the decision in *Girdhari Lall's* case, on the ground that it was necessary in the interest of justice. In Madras, the High Court at first declined to follow the decision on the ground that the appeal was not from the Madras presidency, but in the month of April, 1881, the majority of a full bench of the Court decided that the decision was binding in Madras, and must be followed there. The majority consisted of three out of five judges, and the Hindu judge, Mr. Justice Muttusami Ayyar, was one of the minority. This judge was an orthodox high-caste Hindu, was himself a member of a Mitakshara family, and would be as familiar with the customs and usages of such families as a London banker would be with the custom of merchants with regard to bills of exchange. He delivered a judgment in which the subject is carefully discussed, and the authorities cited, for his opinion that the decision of the Privy Council is not in accordance with the Hindu law. The contrast between this judgment and that of the Privy Council in *Girdhari Lall's* case is remarkable, as in the latter no authorities or arguments are relied on, but the decision is supported by dogmatic assertions only. In March, 1882, the question again came before the Judicial Committee in an appeal from Madras in *Muttayan Chetti's* case, I. L. R. 6 Madras 1. This was one of the cases in which the Madras High Court had refused to adopt the law as laid down by the Judicial Committee in *Girdhari Lall's* case on the

ground that that judgment did not relate to a Madras case. The judges of the Madras Court who heard the case were Sir Walter Morgan and Mr. Justice Muttusami Ayyar. The appeal was heard by Sir Barnes Peacock, Sir Richard Couch, and Sir Arthur Hobhouse.

The judgment was delivered by Sir Barnes Peacock, and is, perhaps, the most perplexing of all the judgments which have been delivered by the Judicial Committee on the subject. Before examining this judgment, it will be well to recapitulate, quite shortly, the propositions which down to that time the Privy Council had affirmed as being principles of Hindu law. They are, first, by Lord Justice Knight Bruce in 1856, that unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge, even though it affected ancestral estate, would still be an act of pious duty in the son. It may, no doubt, be said that these words are wide enough to include a decision that the son would be liable in the lifetime of the father, but such a decision was not required for the purposes of the appeal, as the debtor had died before the suit. Secondly, by Sir Barnes Peacock in 1874, that a conveyance by a man who was a member of a Mitakshara family, who had descendants living at the time, of the entire interest of himself and his descendants in the ancestral property of the family to satisfy his own private debts, would pass the entire interest of himself and his descendants if the debts were not contracted for immoral purposes. A glance at the examples of the shares to which the various members of such a family would be entitled on a partition, which are given at the beginning of this paper, will show what would pass by such a conveyance under this decision. Thirdly, by Sir James Colville in 1879, that under the law of the Mitakshara each son upon his birth takes a share equal to that of his father in ancestral immoveable estate, that the rights of the coparceners in an undivided Hindu family governed by the law of the Mitakshara which consists of a father and his sons, do not differ from those of the coparceners in a like family which consists of undivided brethren, except so far as they are affected by the peculiar obligation of paying their father's debts which the Hindu law imposes upon sons. And, on the authority of *Girdhari Lall's* case, that where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debts, the sons, by reason of their duty to pay their father's debts, cannot recover the property unless they show that the debts were contracted for immoral purposes, and that the

purchaser had notice that they were so contracted. This was the state of the case law at the time the judgment in *Mattayan Chetti's* case was given by Sir Barnes Peacock on May 10, 1882. The appeal was in a Madras case. The family was a Mitakshara family, but by the custom of the family the estate was impartible. The debtor was dead, and the question was whether a charge created by him bound the whole estate in the hands of his son. After stating the facts the judgment proceeds:—

'It was contended on the part of the plaintiff . . . secondly, that the Zamindari, or at least the interest which the defendant took therein by heritage, was liable as assets by descent in the hands of the defendant as the heir of his father for the payment of his father's debts. . . . Their Lordships are of opinion that the appellant is entitled to succeed on the second ground. . . . Their Lordships consider that the case is governed by the case of *Girdhari Lall* v. *Kantoo Lall*. The doctrine therein laid down was not new, but was supported by the previous cases therein cited. The principle of that case was adopted by this board in the case of *Suraj Bansi Koer*, and has been very properly acted upon in Bengal, in Bombay, and in the North-West Provinces; and although it was not acted upon by the High Court in Madras as it ought to have been in the case now under appeal, it has since been acted upon in a full bench decision by all the judges of that Court except two who dissented, of whom Mr. Justice Muttusami Ayyar was one. . . . The defendant is liable for the debts due from his father to the extent of the assets which descended to him from his father, and all the right and interest of the defendant in the Zamindari which descended to him from his father became assets in his hands, and that right and interest, if not duly administered in payment of his father's debts, is liable as against the defendant to be attached and sold in execution of the amount which may be decreed against him.'

These passages constitute the whole operative part of the judgment. The rest is only introduction. It will be noticed that while the Committee decide that the liability of the son is to be limited to the interest in the family ancestral estate which has descended to him as the heir of his father, they do not say what that interest is, whether it is the whole interest to which the son ever became entitled because he was the son of his father, or whether it is only the difference between the fractional share to which he would have been entitled had a partition taken place in the lifetime of the father and the larger fractional share to which he would have been entitled had the partition taken place after his father's death. In practice, the judgments are interpreted to mean that the whole interest which a man's descendants ever gain in the ancestral family estate is liable for the ancestor's debts. If this was intended to be the meaning of the words used, this judgment would seem to

be inconsistent with the first two propositions affirmed by Sir James Colville in 1879. The only other case on the subject which it is necessary to notice is that of *Nanomi Babuasin* v. *Modhun Mohun*, I. L. R. 13 Cal. 21, in which the judgment was delivered by Lord Hobhouse in December, 1885. The portion of the judgment which deals with this question is as follows:—

'There is no question that considerable difficulty has been found in giving full effect to each of the two principles of the Mitakshara law, one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other, that he is legally bound to pay his father's debts not incurred for immoral purposes to the extent of the property taken by him through his father.... Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditor's remedies for their debts unless they are tainted with immorality. On this important question of the liability of the joint estate their Lordships think there is now no conflict of authority.'

The outcome of all this is that as far as the Courts of Law are concerned the special distinguishing features of the Mitakshara joint-family system are abolished, and as far as the Courts could destroy it the system has ceased to exist. This, as must always be the case when the law of the Courts differs from the law of the people, has caused much misery and ruin, and has also, in its own way, tended to foster a feeling of distrust and discontent among certain classes. But this is all that it has been able to do. Notwithstanding the decisions of the Courts, the Mitakshara joint undivided family with all its immemorial usages, customs, and laws, continues and will continue to be the system under which Hindus, over by far the larger part of India, regulate and will continue to regulate their lives and fortunes. The cause which appears to have been most active in maintaining the differences which exist between the law of the Courts and the laws of the peoples of India, is the doctrine held by the Judicial Committee, that, as they are the Final Court of Appeal, they are unable to reconsider their own decisions, but, that whatever may have been the law on any subject before a decision of theirs was pronounced, after their pronouncement the law is as they have declared it, and can only be changed by legislation. This doctrine is no doubt beneficial as regards the House of Lords, as the Law Lords are in touch with the people affected by their decisions, and, if they do not commend themselves to the desires of the community affected by them, the law can be changed by Parliament. But the case of the Privy Council in its relation to India is very different. Very

few of its members have much knowledge of India, and fewer still have ever been much in touch with the Indian peoples, and it would be very difficult to change either the Hindu or Mahomedan law as declared by the Privy Council by legislation. The Queen's Courts are under the obligation to administer Hindu law to Hindus, and Mahomedan law to Mahomedans, and any attempt by the legislature to change, what had been declared by the highest tribunal to be Hindu or Mahomedan law, unless it were to premise that the highest tribunal had been misled in some of its declarations as to such law, would look very like an infringement of the rights of the Indian peoples which were created by Statute in 1781, and have since been over and over again recognized and confirmed by Acts of Parliament, Acts of the Indian Legislatures, and the Charters of the Courts.

W. C. PETHERAM.

WINDING-UP.

'By the Court' *versus* 'Subject to the Supervision of the Court.'

THE winding-up of a company 'by the Court' is an expression which is to be found in the Companies Act, 1862, and by the Companies (Winding-up) Act, 1890 (s. 31), 'for the purposes of this Act a company shall not be deemed to be *wound up*'—which means in course of winding-up—'by order of the Court, if the order is to continue a winding-up'—or, to speak more accurately, a voluntary winding-up—'under the supervision of the Court.' An order for winding-up by the Court is what the newspapers call 'a compulsory order.' Save as regards an extension of jurisdiction in voluntary liquidations, whether under supervision or not, to certain Courts other than the High Court, the control of the Board of Trade over liquidators in respect of their accounts (s. 15), and a new power given to the Official Receiver where windings-up, voluntarily or under supervision, are not being properly conducted (s. 14), the Act of 1890 only deals with liquidations under compulsory orders, that is to say, 'by order of the Court.' It is necessary, therefore, to go back to the Act of 1862—now about thirty-seven years old—and the cases decided upon it, to ascertain how the judge is to decide whether the order he is to make is for winding-up by the Court or only subject to its supervision, and of course the question only arises when the company by its shareholders has passed a special or extraordinary resolution for voluntary winding-up. It is, however, of no consequence that the resolution has been passed after the presentation of the winding-up petition, and before the petition comes on for hearing: *In re West Hartlepool Iron Works Company* (1875) L.R. 10 Ch. 618; *In re New York Exchange* (1888) 39 Ch. D. 415.

The first question is, 'What powers has the judge?' and the second, 'What considerations should affect him in exercising those powers?' By s. 147 of the Act of 1862, when a resolution has been passed to wind up voluntarily, 'the Court may make an order directing that the voluntary winding-up should continue, but subject to such supervision of the Court, and with such liberty for *creditors*, contributories, or others, to apply to the Court, and

generally upon such terms and subject to such conditions as the Court thinks just.'

This section was evidently framed to enable *creditors* to come to the Court, for a liquidator or contributory may always ask the Court to determine any question in a purely voluntary liquidation by applying under s. 138 of the Act, and therefore a contributory can seldom gain anything by having a voluntary liquidation continued under supervision; although he, or the company by its voluntary liquidator, may, on strong reasons being shown, obtain, on petition, a supervisi n order: *In re Pen-y-Van Colliery Company* (1877) 6 Ch. D. 477; *In re Gold Company* (1879) 11 Ch. D. 701; and there are cases showing that it is sometimes necessary for the liquidator or a contributory to apply for the Court's supervision. A creditor, however, has no *locus standi* to apply to the Court under s. 138 in a voluntary winding-up.

Where there is simply a question whether the voluntary winding-up should be continued under supervision, or left without supervision, and no one asks for a compulsory order, it seems to be absolutely in the discretion of the Court to make or refuse the supervision order: *In re Bank of Gibraltar and Malta* (1865) L. R. 1 Ch. D. 69; *In re Beaujolais Wine Company* (1867) L. R. 3 Ch. D. 15, 21.

When, being satisfied that a purely voluntary winding-up is not in a particular case the right sort of liquidation, the judge has to decide whether he will make a compulsory or a supervision order, it is submitted that he has not quite so free a hand. Two sections of the Act of 1862 permit and almost oblige him to consult the creditors or contributories as to which order he ought to make.

By s. 149, 'the Court may, in determining whether the company is to be wound up *altogether* by the Court'—the word 'altogether' is superfluous—'or subject to the supervision of the Court . . . have regard to the wishes of the creditors or contributories,' and may direct meetings of either body to be held in order to ascertain its wishes.

By s. 91, 'the Court may, *as to all matters relating to the winding-up*, have regard to the wishes of the creditors or contributories,' and direct meetings accordingly. Inasmuch as s. 91 is one of the provisions of the part of the Act which is allotted to winding-up by the Court, one would have thought that it only applied to questions arising *after* a compulsory order had been made, but a wider construction has been placed upon it, and it has been held to come into operation when the petition is filed: *In re Chapel House Colliery Company* (1883) 24 Ch. D. 259; *In re Western of Canada, &c. Company* (1873) L. R. 17 Eq. 1, and therefore on every petition day,

creditors and shareholders appear to support or oppose applications for winding-up orders, and are listened to, whether there is a voluntary liquidation in existence or not.

It has already been pointed out that the position of a contributory is less favourable than that of a creditor in an attempt to obtain a supervision order, and it has been held that the existence of a voluntary winding-up is prima facie a bar to a contributory's obtaining a compulsory order: *In re Bank of Gibraltar and Malta* (1865) L. R. 1 Ch. D. 69; *In re Gold Company, ubi sup.* The last case cited tends to show indeed that, except under very special circumstances, e. g. where the resolution for voluntary winding-up has been passed fraudulently, he is debarred from obtaining even a supervision order.

But it is rather the position of a creditor which is now being dealt with, and his rights stand on a different footing. By s. 145 of the Act of 1862, 'the voluntary winding-up of a company shall *not be a bar* to the right of any *creditor* of such company to have the same wound up by the Court, if the Court is of opinion that the *rights* of such creditor will be *prejudiced* by a voluntary winding-up.'

Now to ascertain what a creditor's 'rights' are, irrespective of s. 145, one must again go to the Act of 1862, as interpreted for the most part before Sir Roland Vaughan Williams came on the scene as the winding-up judge.

S. 79 of the Act of 1862 states several grounds on which a winding-up by the Court may be ordered, and without going into the question whether any one of these grounds may be relied on by a petitioning *creditor*, there is one ground on which he may certainly rely, viz. that 'the company is unable to pay its debts.' This might have been held to be confined to the case of general insolvency, had not s. 80 shown that neglect for a defined period to pay a particular debt, or a return of *nulla bona* to an execution was proof of inability to pay debts.

The next clause to be referred to (s. 86) seems to give the Court a discretion, for it says that 'upon hearing the petition the Court may dismiss the same with or without costs; may adjourn the hearing conditionally or unconditionally, and may make an interim order, or *any other order that it deems just*.' This discretion in favour of creditors has, however, been warped by purely judge-made law—the *ex debito justitiae* rule. So early as 1865, Lord Cranworth, in the House of Lords, gave birth to a dictum that a creditor whose debt is presently due, and who cannot get payment of it, is *ex debito justitiae* entitled to a winding-up by the Court, and that, ordinarily speaking, it is the duty of the Court to make the order: *Bowes* v. *Hope Life Insurance Company*, 11 H. L. C. 389. And in several cases

this dictum has, subject to limitation, been fortified by actual decision. For instance, in *In re Chapel House Colliery Company, ubi sup.*, Bowen L.J. says that 'it is not a mere matter of discretion whether the Court will order a company to be wound up or not, it is the duty of the Court to give the *creditor* that relief which the Legislature intended to give him.' But he afterwards points out that even apart from s. 91 the creditor has not an absolute right to a winding-up. But the *ex debito justitiae* rule, although it holds good as between the petitioning creditor and the company, is clearly inapplicable as between the creditor who is petitioning and the company's other creditors: *In re Chapel House Colliery Company, ubi sup.*; *In re West Hartlepool Ironworks Company* (1875) L. R. 10 Ch. D. 618; *In re Western of Canada, &c. Company, ubi sup.*; *In re Uruguay Central, &c. Company* (1879) 11 Ch. D. 372. In such cases the Court must respect the wishes of the whole body of creditors in conformity with sections 91 and 149 of the Act of 1862.

So much for the *ex debito justitiae* rule when there is no voluntary winding-up.

Mr. Justice Wright, the present winding-up judge, recently asked the question, 'How far does the rule hold good when there is a voluntary winding-up in existence?' And by his decisions he has answered the question, although he has not yet delivered any judgment stating definitely the reason on which his decisions have been founded. These reasons are for the most part to be found in the judgments of those who interpreted the statute-law prior to the passing of the Act of 1890.

'If,' says Mellish L.J., 'a resolution for a voluntary winding-up has been passed before the time when the petition for a compulsory winding-up comes on to be heard, the 91st and the 149th sections of the Act make it the *duty* of the Court to have regard to the wishes of the body of the creditors in determining whether there shall be a compulsory winding-up, or whether the voluntary winding-up shall be continued under supervision'; and he added that if there was no sufficient evidence as to their wishes, the Court might order a meeting to be summoned: *In re West Hartlepool Ironworks Company, ubi sup.*

According to Lopes L.J. in *In re New York Exchange, ubi sup.*, the *onus* is on a creditor petitioning for a compulsory order to show that he will be prejudiced by the continuance of a voluntary winding-up; and from the observations of Fry L.J. in the same case, it is clear that he thought the wishes of the creditors generally ought to be regarded; for he says, 'the petitioner is a creditor—no other creditor appears to support him, and two creditors appear to object.' And in *In re Electrical Engineering Company* (1891) 64 L. T.

N. S. 658, the petitioning creditor was unable to get anything more than a supervision order from Kekewich J. when he was unsupported but opposed by other creditors.

If then a creditor stands in the same position as the other creditors, and they as a body, or a substantial majority in value of them, are satisfied with a supervision order, there appears to be reason enough for refusing a compulsory order. But undoubtedly a single creditor ought to be able to get a compulsory order if he stands in a worse position, having regard to the existence of a voluntary liquidation, than the other creditors—for instance, if they are secured and he is not; if they are most of them also shareholders in the company, or persons to whom for some reason or other the voluntary liquidator is likely to be partial—even if there is opposition by the other creditors. And where the other creditors are so indifferent that they do not either support or oppose a petition for a compulsory winding-up, slight 'prejudice' ought to bring the petitioning back within the *ex debito justitiae* rule.

Some such case seems to have been in the mind of Cotton L.J. in *In re New York Exchange*, when he said that 'if the creditor can make out a probable case of the assets having been improperly dealt with, he shows that he is prejudiced, and is then entitled to a compulsory order, but . . . the mere fact that the investigation could be carried further back under a compulsory order'—the resolution for voluntary winding-up in that case was passed after the petition had been presented—'is not enough to entitle him to it, when he lays no ground for supposing that carrying it back would be a benefit to him.'

Having regard to the above rules some further matters have to be considered when a case for a compulsory or supervision order is 'on the line,' and what these matters are depends largely on the particular circumstances of each case.

Comparative expense is one of them, and Jessel M.R. said that it was cheaper and better in a large liquidation to get a compulsory order at once as it saved the cost of frequent applications to the Court: *In re Western District Bank*, W. N. (1879) 151. It must be remembered, however, that the scale of remuneration in a compulsory winding-up has been fixed on different lines since 1890, and that an application under a supervision order is now generally made by an ordinary summons at slight expense. In order to contrast all that may be done under a compulsory order and a supervision order, one would have to set out a great many of the sections of the Act of 1862 relating to winding-up—to say nothing of the Act of 1890 which is referred to below—and if space allowed it would not be

difficult to show that the creditor ordinarily gets little more under the former order than the latter.

If a supervision order is made the Court may, under s. 150, appoint an additional liquidator or liquidators, and by s. 151 such an order stops, as effectually as a compulsory order would, actions and proceedings which a voluntary liquidator, friendly to the litigants, might not care to have stayed under ss. 85 and 138. A private examination under s. 115 may be ordered, whether the winding-up is under a compulsory or a supervision order, and it has not yet been decided that such an examination may not be adjourned into Court and heard publicly. By consent this has been done, and the obtaining an order for private examination may be made a condition of the supervision order: *In re Land Securities Company*, W. N. (1894) 91.

Misfeasance proceedings may be taken in a liquidation under supervision, and the conduct of them may be given to a creditor, and the Court may order directors to be prosecuted (s. 167). The claims of creditors may also be dealt with in much the same way as under a compulsory order. In favour of supervision orders we may also set out *in extenso* s. 151 of the Act of 1862, which is as follows:—

'Where an order is made for a winding-up subject to the supervision of the Court, the liquidators appointed to conduct such winding-up may, subject to any restrictions imposed by the Court, exercise all their powers, without the sanction or intervention of the Court, in the same manner as if the company were being wound up altogether voluntarily; but, save as aforesaid, any order made by the Court for a winding-up subject to the supervision of the Court, shall for all purposes, including the staying of actions, suits, and other proceedings, be deemed to be an order of the Court for winding-up the company by the Court, and shall confer full authority on the Court to make calls, or to enforce calls made by the liquidators, and to exercise all other powers which it might have exercised if an order had been made for winding-up the company altogether by the Court; and in the construction of the provisions whereby the Court is empowered to direct any act or thing to be done to or in favour of the [official] liquidators, the expression [official] liquidators shall be deemed to mean the liquidators conducting the winding-up subject to the supervision of the Court.'

This section, if liberally construed, places a difficulty in the way of a petitioning creditor ordinarily showing how he can be in a better position under a compulsory order. Has the Companies (Winding-up) Act, 1890, strengthened the hands of a creditor who seeks for a compulsory order when there is a pending voluntary

liquidation? Among the radical changes effected by that Act, when the winding-up is 'by the Court,' the two foremost are (1) putting the Official Receiver—an officer of the Court and of the Board of Trade—in the position temporarily or permanently of liquidator; and (2) the power in certain cases of *publicly* examining directors and others under s. 8 of the Act. Both these changes were prompted by the admirers of the practice in bankruptcy, and were naturally not regarded as of much account by the judges of the Chancery Division to whom jurisdiction under the Act of 1890 was at first given.

For instance, the power to order public examination was strongly urged as a ground for making a compulsory order in *In re Electrical Engineering Company, ubi sup.*; but Kekewich J. said, 'The only advantage of a compulsory order would be that which would be gained by *the public*,' viz. under s. 8, 'if these matters were [publicly] investigated. Great as that advantage is to the public, I cannot regard it as such an advantage to the petitioners that, by not having it, they would be "prejudiced" within the meaning of s. 145 of the Act of 1862.' And in *In re Russell Cordner & Company*, '91, 3 Ch. 175, North J. said, 'It is said that by the Companies (Winding-up) Act, 1890, much larger powers of investigation have been given to the Court. But I think that the law remains the same as it was under the previous Acts, that to enable a creditor to obtain an order for the compulsory winding-up of a company, when there is a voluntary winding-up, he must satisfy the Court that his rights will be prejudiced by the voluntary winding-up, that is, that he will suffer by it.' He adds, 'If a creditor can make out a case for an investigation by the Court, there will be a stronger reason now than before the Act of 1890 for making a compulsory order.' And Chitty J. took advantage of the power of the Court to impose restrictions by making a voluntary winding-up under supervision subject to the control of a committee of inspection: *In re Watson & Sons*, '91, 2 Ch. 55. But in '92 the winding-up jurisdiction of the High Court was taken away from the Chancery judges 'proper' and given to Sir Roland Vaughan Williams as the bankruptcy judge and as an additional judge of the Chancery Division, and he very soon expressed rather different views, which may be found in *In re General Phosphate Corporation*, W. N. (1893) 142; *In re Medical Battery Company*, '94, 1 Ch. 444, and *In re Krasnapolsky Restaurant*, '92, 3 Ch. 174, where the learned judge showed that he was satisfied that the power of ordering a public examination was a strong reason for making a compulsory order when the petitioner alleged that an investigation as to the birth and childhood of the company was expedient. But Sir Roland was very fond of ordering public

examinations, especially after what was practically one brought about the resignation of a Cabinet minister; in fact a compulsory order was followed almost automatically by an order under s. 8.

Then came the House of Lords decision in *Ex parte Barnes*, '96, A.C. 146, which practically described an order for public examination as a prima facie slur on the persons ordered to be examined, and rendered comparatively rare the cases in which the Official Receiver could allege sufficient grounds for asking for public investigation. After this decision, which differed from the view of the Court of Appeal as well as that of Vaughan Williams J., the winding-up judge paid little attention to the argument that public investigation was a make-weight in favour of a compulsory order. On being referred to what he had said in *In re General Phosphate Corporation*, he replied, 'That was only a dictum, and although I do not think it was wrong, s. 8 of the Companies (Winding-up) Act, 1890, has since been so construed'—viz. in *Ex parte Barnes*—'that a public examination is now almost unattainable.'

Finally, it may be pointed out that even if a judge makes a mistake by only granting a supervision order, the error is not irreparable. S. 152 of the Act of 1862 shows that a winding-up under supervision may be 'afterwards superseded by an order directing the company to be wound up compulsorily,' and under s. 14 of the Act of 1890, notwithstanding a supervision order, the Court may, on the petition of the Official Receiver, if satisfied that the winding-up under supervision 'cannot be continued with due regard to the interests of the creditors or contributories,' make a compulsory order.

FRANK EVANS.

REVISION POWERS OF THE COURT OF CASSATION.

SINCE the publication of my article on this subject in the LAW QUARTERLY REVIEW of January last a new Act has altered the procedure in one point. Arts. 443 to 446 of the Code of Criminal Procedure (Law of June 8, 1895) entrusted the revision proceedings to the Criminal Chamber of the Court of Cassation, without making any distinction between its powers of investigation and those of ultimate decision. According to current French theories on criminal procedure a distinction is considered necessary between the judicial authorities who send the case for trial and those who try it. Thus any members of the Court of Appeal who have decided on an indictment in the *Chambre de mise en accusation* (an institution corresponding to our grand jury) are forbidden by the Code from taking any part in the judgment of the same case before the Court of Assize (Art. 257). Thus also the *juge d'instruction* is forbidden to take any part in the judgment of matters in which he has acted as the examining magistrate by a Law of Dec. 8–10, 1897 (Art. 1). In the report laid before the Senate on behalf of the Senatorial Committee on this Act, when in its Bill stage, it was stated that, though this had long been the practice of many of the Courts, it was nevertheless important that a law should sanction a practice which was so natural. The *rapporteur* contended that the *juge d'instruction* by the simple fact that he had prepared the case and had decided on sending the accused for trial, had necessarily formed his opinion, and it was as irrational to allow him to take part in the final decision of the case, as to allow a judge who had tried a case in first instance to sit on the Court to which the appeal from his judgment was carried. It was of the greatest moment that all the judges composing the Court of trial should approach cases in entire independence of the jurisdiction which had already dealt with them in any way. It was argued in Parliament when the amending bill was under discussion that the *Chambre Criminelle* of the Court of Cassation was practically in the same position as regards the preliminary inquiry as a *juge d'instruction* or *Chambre de mise en accusation*, and that therefore the judgment of the Court, to be independent, should be delivered without the assistance of the Criminal Chamber. This argument, however, is untenable.

The Criminal Chamber, under the Law of 1895, is alone mentioned, and it is not a preliminary but a final jurisdiction in the cases in which the accused is found innocent or the application is dismissed; and in these cases it has only the same powers as the jurisdictions with which it has been compared. If a new trial is found necessary, it has only power like a *juge d'instruction* to send the case before an ordinary Court. There was therefore no deviation from any principle applied in French criminal procedure in the law as it stood.

The real motive for altering the law was that it was thought desirable that the whole weight of the Court of Cassation should be brought to bear on the final decision of the Dreyfus case. This was set out in a letter from M. Mazeau, the Chief President of the Court of Cassation, to the Minister of Justice, and the grounds given in the discussion in Parliament, mentioned above, are really merely a well-meaning attempt to give a weak-kneed law an appearance of standing firmly on general principles.

The letter from M. Mazeau, dated Jan. 29, 1899, is as follows:—

'We have the honour to send you, with the opinion you asked of us, the depositions made in the semi-official investigation bearing on the last facts alleged by M. de Beaurepaire. We have come to the conclusion that it would be prudent, under the existing exceptional circumstance, not to let the Criminal Chamber alone have the responsibility of the final decision. For eight months back our colleagues have proceeded with a toilsome investigation, in the midst of an unheard-of storm of conflicting passions which have penetrated into the council chamber of the Court. Is it not to be foreseen that a judgment delivered under such conditions would be powerless to set the public mind at ease, and would be wanting in the necessary authority for everybody to bow to it? We do not suspect the good faith or honour of the judges of the Criminal Chamber: but we fear that, troubled by insults and outrages and drawn into contrary currents by circumstances, their independence might be affected without their knowing it, and deprive them of calmness and moral liberty indispensable to enable them to fulfil their duty as judges.'

The text of the new law, dated March 1, 1899, runs thus:—

'The two first paragraphs of Art. 445 of the Code of Criminal Procedure are modified as follows:—

'In case the claim is admissible the Criminal Chamber shall decide on the application for revision, if the matter has reached a point at which it can be dealt with.

'If the matter has not reached a point at which it can be dealt with, the Criminal Chamber shall proceed directly or by rogatory commission to make all investigations into the matter, by confrontations, ascertainment of identity, and all other means calcu-

lated to bring the truth to light. *After the close of the examination, the united Chambers of the Court of Cassation shall decide thereon.*

'When the matter has not reached a point at which it can be dealt with, if the Criminal Chamber, in the case of paragraph 1 above mentioned, or the united Chambers in the case of paragraph 2, find that a new trial can take place, it shall annul the judgments in first or final instance, and all decisions which may be an obstacle to revision; it shall fix the questions to be put, and shall send the accused before some Court or Tribunal other than those which have had previous dealings with the case.'

The unaltered part of the article is as follows:—

'In matters which have to be tried by jury the procurator-general of the Court to which the matter has been sent for re-trial shall draw up a fresh indictment.

'When a fresh viva voce trial cannot be proceeded with against all the parties, especially in case of death, contumacy or of absence of one or more of the persons condemned, of penal irresponsibility or of excusability, in case the period of limitation barring the action or the punishment shall have expired, the Court of Cassation, after having expressly ascertained this impossibility, shall decide on the merits of the case without any preliminary Cassation or reference of the case for re-trial, in the presence of intervening private prosecutors, if any, and of the curators appointed by the Court in the interest of the memory of any deceased person: in this case the Court shall simply annul that of the sentences which had been unjustly inflicted, and shall, if need be, clear the memory of the deceased person.

'If the annulment of the judgment, relating to a living condemned person, leaves nothing subsisting which can be denominated as a crime or a misdemeanour, the case shall not be sent to another Court for re-trial.'

There seems to have been some misapprehension in England and even in France as to the nature of the change made by the new law. 'Expressions used during the debate on the law forced through the Senate by the French Ministry suggest the conclusion that this law incidentally deprives the Court of the power to acquit the accused, and that the most that the Court of Cassation can now do to Dreyfus, even if convinced of his innocence, is to order a re-trial of his case,' says Professor A. V. Dicey in a letter to the *Times* of March 16. The last paragraph of Art. 445 of the Code of Criminal Procedure which, as seen above, remains unaltered, will give Professor Dicey a conclusive answer on this point. The paragraph in question is in French as follows:—

'Si l'annulation de l'arrêt à l'égard d'un condamné vivant ne laisse rien subsister qui puisse être qualifié crime ou délit, aucun renvoi ne sera prononcé.'

This wording is sufficiently precise. It gives the Court of

Cassation power to find that there is no evidence of a crime or misdemeanour having been committed by Dreyfus. In this case there would be no *renvoi*.

The confusion seems due to a passage in the *Réquisitoire* of the warm-hearted, but not always accurate Procurator-General, M. Manau, in which he is reported to have said: 'Vous n'avez que le droit de dire qu'il existe des faits nouveaux ou des pièces nouvelles inconnues lors de sa condamnation et qui sont de nature à établir son innocence, et, si vous le reconnaissez, de renvoyer l'affaire devant de nouveaux juges.'

The newspapers which take the side of revision declare this reading of the law to be false, and those which are hostile to it explain that they consider the last clause of Art. 445 to be a mere amplification of the paragraphs which precede it. This view shows that its supporters are unaware that it formed part of the older chapter of the Code of Criminal Procedure on revision as an independent article, Art. 447 (Law of June 29, 1867). It then read as follows:—

'When the case of revision mentioned in No. 1 of Art. 443 (the case in which the alleged victim of a murder is shown to exist) arises, if the annulment of the sentence of a living condemned person leaves nothing which can be denominated crime or misdemeanour, the case shall not be sent to another Court for re-trial.'

This article was extended by the Senate to all the cases of revision mentioned in Art. 443 (see Dalloz, Recueil de Jurisprudence, 1895, 4me partie, p. 82, 3rd col., last note; also Normand, Droit Criminel, Pichon, 1896, p. 762 et seq.; Leloir, Code d'Instruction Criminelle, Pedone, 1898, p. 490, Note No. 20). It is strange that in spite of the precise wording of Art. 445, there should be any room for contention that the Court of Cassation has no right to apply the paragraph in question to Dreyfus. The 4th paragraph of Art. 445 is complete in itself, and the fact that under the earlier law it was an independent article, viz. Art. 446, separate from the 5th paragraph which was then Art. 447, is a sufficient answer to those whose argument is based on the assumption that that paragraph is in the Code for mere amplification, which would mean for no purpose whatsoever.

THOMAS BARCLAY.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Historical Introduction to the Private Law of Rome. By the late James Muirhead. Second Edition, revised and edited by Henry Goudy. London: Adam & Charles Black. 1899. 8vo. xxv and 457 pp.

It is pleasing to find that this work of the late Professor Muirhead, of which we spoke in high terms in our number issued in January, 1887, has reached a second edition. To most of the inhabitants of, at any rate, the southern portion of Great Britain, who are led to study the law of Rome, it will have been caviare, for it is scarcely designed for that large body of our law students who unfortunately throw the subject aside as soon as they have gained that very superficial acquaintance with it which is required by the Council of Legal Education; and that there has been a demand for a second edition at all is an encouraging symptom to those who would like to see the civil law more seriously studied by a larger number of Englishmen than has hitherto been the case. No one who has read the book can have felt any doubt that the author had mastered his authorities, or that he had a singularly wide and profound knowledge of the continental literature dealing with the subject; and the publishers have been most fortunate in securing the services of an editor admirably qualified for the task by his knowledge, his judgment, and his regard for the author whose work has been entrusted to him for republication.

Professor Goudy has shown both taste and wisdom in leaving the substantive text of his predecessor unaltered, except (as he says himself) by correcting a few verbal inaccuracies. In his desire, too, to keep the notes within reasonable compass, and so to avoid increasing the size of the book, he has forborne from any serious criticism of certain theories put forward therein on various interesting historical questions, though he almost gives us to understand that the forbearance has cost him a pang, to which we may venture to hope relief may be given in some later independent work from his own pen. What he has done, in fact, is to contribute a number of new footnotes, distinguished from those of the author by being enclosed between brackets; to add, after the eight longer notes included in an appendix in the original work, five similar new notes of his own; and finally to print, at the end, the conjecturally restored text of the Twelve Tables, according to the rearrangement of the fragments proposed by Schoell, and adopted by Bruns in his Fontes Juris.

The editor's own footnotes, although numerous, and conclusive as to his own full knowledge both of the texts and the literature of Roman Law, are laudably brief, and in most cases consist merely of references to works on the subject which have appeared comparatively recently, or which were not referred to by Professor Muirhead, such as Cuq's valuable 'Institutions juridiques des Romains,' Voigt's 'Römische Rechtsgeschichte,' Karlowa's 'Römische

Rechtsgeschichte,' and Girard's 'Manuel Élémentaire de Droit Romain.' A few of them, however, are somewhat longer, though seldom exceeding a dozen lines; among these may be mentioned those on the presence of the cognates in the *concilium domesticum* (p. 34); on the legal distinction between *heredia* and *ager* (p. 37); on the author's own theory as to the origin of *mancipatio* (p. 60); on the effect of the Land Transfer Act, 1897 (p. 169); on Schulin's interpretation of the 'partis secanto' in the Twelve Tables (p. 200); on the historical origin of Stipulation (p. 215); on the Scottish legitim (p. 235); on Roman analogies of Bills of Exchange (p. 243); and on recently discovered manuscript fragments of Roman legal literature (p. 314).

Of the five longer notes added by the editor at the end of the volume, the most interesting and valuable are those dealing with *capitis deminutio* and with *furtum lance licioque*. On the first of these subjects, where one thorny question is that of the nature of *c. d. minima*, and of its relation to the two other forms of the same thing, Professor Goudy seems disposed to adopt Mommsen's theory that *c. d. minima* 'represents simply loss of previous status by an act of subjection of one person to another within the sphere of private law'; but this fails to explain why a *filius familias* was *minutus* in being emancipated under the law of Justinian. In dealing with *furtum lance licioque*, the writer has an interesting discussion of the true significance of the forms in which the search for stolen property had to be conducted; he appears to lean to Von Ihering's notion that the *licium* or loin-cloth was just the ordinary garb of the early Aryans, as it may still be seen among the lower class Hindoos, and that its use in this case was the relic of what had been done by the ancestors of the Romans, though its origin may have been wholly unknown to them. In the last of his notes, Professor Goudy discusses the question 'Who was Gaius?' with reference to a theory, propounded by a writer in the Cape Law Journal for February, 1894, but for which there does not appear to be a tittle of real evidence, that he was a certain Gaius Laelius Felix; and he takes leave of us with the tantalizing conclusion that 'the veil of obscurity that enshrouds Gaius' personality still remains to be lifted.'

J. B. M.

The Land Transfer Acts, 1875 and 1897, with a Commentary on the Sections of the Acts, &c. By C. FORTESCUE BRICKDALE and WILLIAM ROBERT SHELDON. London: Stevens & Sons, Lim. 1899. La. 8vo. xxiv and 581 pp. (20*s.*)

How many lawyers have refrained from reading the Land Transfer Act, 1875, without much harm happening to themselves or their clients from this neglect of a bulky piece of legislation? The Act contains 129 sections, but, as the authors point out in their preface, although it has been on the statute book more than twenty years, it has not been the subject of judicial decision. No doubt this long slumbering statute in its awakened and amended state will shortly make up for lost time. It is a pity that the legislature did not pass one brand-new statute as to the registration of title, instead of galvanizing what was almost a dead letter by an amending Act enabling registration to be made compulsory from time to time as regards slices of the country. The application of the amending and resurrectionizing system to the system of registration of title has thrown on the authors of the book under review labours which they were bound to undertake for the sake of their readers. But the onus has not been shirked. Messrs. Brickdale and

Sheldon have not confined themselves to annotating the provisions of the Acts of 1875 and 1897 and the Rules of last year. Much learning and skill are shown in these notes, but a book which merely contains Acts and Rules with notes is not the sort of volume which is likely to attract those who tackle for the first time such a loathsome subject as compulsory registration of title probably is to most lawyers. The authors begin, in the right way, by giving their readers an introduction. It is in nine chapters, which occupy 65 pages. These chapters fill three parts of the four into which the book, minus the appendices and precedents, is divided. Four chapters contain a summary of the Acts; four more are devoted to procedure and practice, and another contains 'short dissertations on details of conveyancing practice.' Perhaps in future editions we shall have more introduction or treatise, less and diminishing annotation, and a mere reprint of sections and rules in an appendix; but this method of treatment was not to be looked for in a first edition, and the authors are to be congratulated on the industry and skill which were absolutely necessary for the production of such an excellent book, in so short a time, on such a difficult subject.

F. E.

The Land Transfer Acts, 1875 *and* 1897, *and Rules and Orders thereunder, with Notes, and Forms and Precedents adapted for use under the Acts.* By BENJAMIN LENNARD CHERRY and HAROLD WALTER MARIGOLD. London: Sweet & Maxwell, Lim. 1899. La. 8vo. xxiv and 564 pp. (18*s.*)

The Land Transfer Acts, 1875 *and* 1897, *and Rules, with Introduction, Notes, Forms and Precedents.* By J. S. RUBINSTEIN and W. LEE-NASH. London: Waterlow Bros. & Layton, Lim. 8vo. xiii and 298 pp. (5*s.*)

MESSRS. CHERRY and MARIGOLD have produced a book which is likely to form a standard work on registration of title. The subject has been investigated by them with great minuteness, and as the result they have given to the profession a very full discussion of the law and practice of registration as now contained in the Land Transfer Acts of 1875 and 1897, and in the Rules of 1898. At the outset of the Act of 1897 they have to deal with the establishment of the real representative, a matter which has no direct connexion with registration of title, and which would have been more conveniently dealt with in a separate statute. It effected a change which had nothing to do with the controversy over compulsory registration, and in the attention that was given to the disputed part of the Act the drafting of the earlier sections received too little discussion. Hence they have given rise to a good deal of adverse criticism. Some of that offered by Messrs. Cherry and Marigold suggests difficulties which will hardly arise in practice. Section 1 provides that real estate vested in any person, without a right in any other person to take by survivorship, shall on his death devolve to his personal representatives. The words, it is said, taken literally, are wide enough to cover a life estate, so as to make it necessary for the remainderman to get the legal estate out of the personal representatives of the deceased tenant for life. But reasons are assigned against such a construction and, having regard to the scope of the statute, the Court would require very clear words to divert the estate from the remainderman. More substantial are the difficulties raised by the failure to provide for the possibility of appointing a separate real representative, and, in a case of

intestacy, for the vesting of the legal estate pending the appointment of an administrator. There will be cases in which a testator would find it convenient to appoint special executors of the real estate, just as now, apparently, he can appoint them of a particular part of his personal estate. No such option, however, the authors point out, is given in the Act. Upon an intestacy it is a moot point whether the legal estate devolves upon the heir-at-law till the grant of administration, or whether it is in abeyance. The authors take the former view, but it may be questioned whether the intention of the Act is not to divest the heir entirely of his legal rights until he gets them through the personal representative by assent or conveyance. The point becomes material when the heir wishes to assert his rights against tenants, but of course the obvious remedy is for him to secure that administration shall be taken out as speedily as possible.

Messrs. Cherry and Marigold's book contains in succession the Land Transfer Act, 1875, the Act of 1897, the Land Transfer Rules, 1898, the Rules under the Small Holdings Act, 1892, and precedents of dispositions by real representatives and of dealings with registered land. The system of registration established by the Act of 1875 has been varied in several important respects, and also in a large number of minor details, by the Act of 1897. These changes are noted under the various sections of the former Act. Under the Act of 1875 it was provided (sect. 21) that no title to land adverse to the title of the registered proprietor could be acquired by possession. This enactment was doubtful as a matter of principle, and it removed the possibility of leaving disputed questions of boundaries to be settled by proof of possession. The section is now repealed and sect. 12 of the Act of 1897 allows of a rectification of the register upon the application of a person who would, but for these Acts, have obtained a title by possession. But such rectification cannot be made as against an estate acquired for value by registration under the Acts. Hence a purchaser who relies on the register is absolved from the necessity of inquiring into the state of the actual possession; while a possessor whose title would be perfect by lapse of time may find the effect of the Statute of Limitations in his favour quite destroyed. Messrs. Cherry and Marigold point out the unsatisfactory nature of this state of things and urge that the statute should be allowed to have its ordinary effect, persons who have acquired a title by possession becoming entitled as of right to be registered; and that a purchaser from the registered owner should be required as a condition of safety to see that the registered owner is in possession.

Throughout the Acts and Rules Messrs. Cherry and Marigold have expended much labour and research in offering suggestions as to the working of the present system of registration and in clearing away difficulties. Registration is now compulsory over half the County of London, so that experience of registered dealings with land will rapidly accumulate, and it will become clear whether, as the authors suggest, it is necessary for the Acts to be redrafted before they can prove satisfactory. But to the Acts in their existing form this book will be found an instructive and convenient guide.

The volume which has been compiled by Messrs. Rubinstein and Lee-Nash is on a less ambitious plan. Substantially it consists of a print of the Land Transfer Acts and the Rules. Some notes are appended to Part I of the Act of 1897; but the reader is left to discover for himself the changes made in the Act of 1875, the Act being printed in its unamended form without any guide to the amendments contained in the later Act. Hence the book cannot be safely used until the reader has noted up these changes

for himself. The Land Registry Act, 1862, with some subsidiary matter, is printed in the Appendix.

The Digest of English Case Law, containing the reported decisions of the Superior Courts and a selection from those of the Irish Courts to the end of 1897. Under the general editorship of JOHN MEWS. Sixteen Volumes. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1898. La. 8vo. (£20—£16 net.)

THE amalgamation of Chitty's Equity Index, Fisher's Common Law Digest, and Mews' Consolidated Digest, and the addition of the cases decided in the period 1888–1897, must have been a severe piece of work, and Mr. Mews and his assistants are to be congratulated on its conclusion. The new digest covers nearly 14,000 pages of print, and the mere names of the cases occupy a volume of 759 double-column pages.

In this edition minor subjects are grouped under more important headings. For instance, 'Hawker and Pedlar' is now a sub-heading to 'Markets and Fairs'; 'Party Wall' is under 'Boundaries,' and 'Fraudulent Conveyances' will be found under the comprehensive head of 'Fraud and Misrepresentation.' The Appendix of 'Decisions and Books . . . doubted, overruled, followed or otherwise commented on,' which appeared at the end of the last edition of Chitty's Equity Index, has not been reprinted in the new work—probably for the reason that the information is now readily accessible in Messrs. Dale and Lehmann's Digest of Overruled Cases and Messrs. Talbot and Fort's Index of Cases judicially commented on.

Some few omissions of the old digests, as might be expected, remain unsupplied. We cannot find *Stanley* v. *Jones*, 7 Bing. 369, 33 R. R. 513, a still quotable case on champerty, nor *Wilkins* v. *Wright*, 2 C. & M. 191, 39 R. R. 746, an important authority on bastardy proceedings. The only positive error we have found is that the decision in *Nye* v. *Moseley*, 6 B. & C. 133, is misrepresented in the note of it at col. 175 of vol. iv. *Doe* d. *Lloyd* v. *Passingham*, 6 B. & C. 305, 30 R. R. 327, is a pure real property decision unconnected with the law of landlord and tenant, under which head it must have found its way—probably in the former digests—by some mistake. On the whole there is no doubt that a great improvement has been effected in both completeness and accuracy. And it is a great boon to find our equity cases arranged under catchwords in the well-known style of 'Fisher,' instead of having to search scores of notes collected under one general sub-heading—as in the last edition of 'Chitty.'

In one caption (*s. v.* Arbitration, 611) we observe that the Code of Civil Procedure of Lower Canada is described as 'the Civil Code of Procedure in force in British North America.' It is certainly in force in British North America, but not in the whole of it as the words would suggest. This, however, is a very minute slip.

We do not know why the Times Law Reports and the Reports of Commercial Cases are excluded from the tables of concurrent reports prefixed to vol. i, or why these tables commence no earlier than 1810.

Studies in Roman Law, with Comparative Views of the Laws of France, England, and Scotland. By LORD MACKENZIE. Edited by JOHN KIRKPATRICK. Seventh Edition, revised. Edinburgh and London: William Blackwood & Sons. 1898. xlvi and 473 pp.

THE first edition of Lord Mackenzie's well-known Studies in Roman Law was published in 1862, and now it has reached a seventh edition.

This is a pretty fair guarantee of the utility of the work; at any rate, it proves that it has supplied a want. We imagine that it has been more in favour with students and inquiring laymen than with legal scholars, but, if so, that is just what the author desiderated. In his preface to the first edition, the author said—'A good elementary book in English is still much wanted, giving a clear, simple, and accurate view of the general principles of the Roman Law, with so much of its history as is necessary for a correct knowledge of the system. In the present work I have endeavoured to give a concise exposition of the leading doctrines of the Roman Law as it existed when it reached its highest development in the age of Justinian; and great pains have been taken to simplify the subject as much as possible, by a systematic arrangement, by avoiding all abstruse inquiries of an antiquarian character, and by confining myself to such matters as appeared to be useful and instructive. . . . To this exposition, which is my chief design, I have added a subordinate one, by drawing some comparison, more or less important, between the Roman system and the laws of France, England, and Scotland.'

An introduction of about fifty pages gives a sketch of the history of the Roman Law from the foundation of the city to the present day, and there is also a preliminary chapter intituled 'Jurisprudence and the Principal Divisions of Law.' Then follows the systematic exposition of the subject, based upon the well-known arrangement of Gaius and Justinian in their Institutes, viz. the law relating to persons, to things (under the three great branches of real rights, succession, and obligations), and to actions or civil procedure. Part VI of the book is devoted to criminal law and procedure, and contains an interesting chapter on the Roman bar, and there is a brief Appendix dealing with a variety of matters.

There can be no doubt that the recent editions, and particularly the one now under consideration, have materially added to the value of the book by notes and other supplementary matter. Lord Mackenzie was too sparing of references to authorities. Moreover, a great deal of light has, of course, been thrown upon the Roman Law since 1862, while many changes have been made in French and British Law, so that many of the original statements in the text had become antiquated or incorrect; these have generally been noticed and references to the latest authorities given in the notes. A comparison of the list of authorities cited or consulted in this edition with that given in the first edition may be taken as an indication to what extent additions and alterations have been made. The present list indeed gives a convenient and pretty extensive account of modern English, French, and German writers who have dealt more or less directly with Roman Law, though we notice that some important works, such as Lenel's 'Palingenesia,' Karlowa's 'Römische Rechtsgeschichte,' Bekker's 'Aktionen,' and Appleton's 'Histoire de la propriété prétorienne,' have been omitted. There are also one or two inaccuracies in this part of the work to which the editor's attention may be called. Thus the works of Paul Krüger are not distinguished from those of Hugo Krüger; Muirhead's 'Gaius' was published in 1880 (not 1879); Abdy and Walker's 'Gaius' was published at Cambridge (not London). The last (see p. 48 n.) edition of Bruns' 'Fontes' was in 1893; the author of the 'Sénat de la république romaine' is Willems (not Wilhelms).

The editor's notes throughout the work (for, as he says in his Preface, he has refrained from making any material alterations upon the text itself) seem to be on the whole appropriate and well judged. We will content ourselves with a few criticisms, which should be considered in any future edition. In the historical sketch (which though superficial may be com-

mended for its lucidity) it is said that 'under Hadrian the organization of the Empire was openly despotic' (p. 15). This goes too far, for although the Comitia no longer actually assembled, they were not in theory abolished, and the Senate was an active legislative body. Imperial constitutions were as yet but sparingly issued, and only in the form of rescripts emanating from the Emperor as chief magistrate. It cannot, we think, be said that the Empire became 'openly despotic' till the reign of Diocletian. On p. 14 Augustus is spoken of as if he were perpetual consul and praetor, and on note 1 of that page the period of *classical* jurisprudence is said (contrary to the general view of modern writers) to extend from B.C. 31 to A.D. 235. On this latter point, however, see Grüber in L. Q. R. vol. vii. pp. 70 sq. On p. 17, among the names of eminent jurists who flourished between A.D. 120 and 244, that of Julian is not mentioned, though he was certainly inferior to none of them except Papinian. On p. 91, note 2, it is wrongly said that Junian Latins did not enjoy *testamenti factio passiva*. They might be instituted heirs, but wanted *jus capiendi*. (See Ulp. *Frag.* xx. § 8.) Dealing with *noxae deditio*, there are three separate notes (viz. p. 138, n. 2, p. 139, n. 2, and p. 272, n. 5) which are not quite consistent with each other. Nor is it correct to speak of separate noxal actions, as is done on p. 272; *noxae deditio* was a privilege conferred on a *paterfamilias* when sued in an ordinary action on the delict of the slave or *filiusfamilias*.

On p. 21 the purport of the Valentinian Law of Citations is not quite accurately stated, nor can the dates of the Codes of Gregorius (Gregorianus is thought by Mommsen to be wrong) and Hermogenianus be given positively as is done on p. 22. On p. 65, note 1, the editor uses the expression 'the senseless doctrine of the equality of States.' But he might just as well say 'the senseless doctrines of International Law,' for if States are not to be regarded as equal in rights, we fail to see any basis whatever for International Law.

Despite its defects, however, we must commend the book. Its style is lucid and simple; the parallels between the different systems of law, which it gives, are interesting and instructive; and the topics discussed are those best suited to the class of readers to which it appeals.

Prideaux's Precedents in Conveyancing; with dissertations on its law and practice. Seventeenth Edition. By JOHN WHITCOMBE; in two volumes. London: Stevens & Sons, Lim. 1899. La. 8vo. Vol. I, li and 838 pp.; Vol. II, xlix and 902 pp. and Appendix. (£3 10s.)

IT appears unnecessary to review this book at length, as the fact that it has reached the seventeenth edition shows that it has been found very useful. It has always had a large circulation, especially among solicitors. The precedents are so arranged that a somewhat ignorant clerk can readily frame a draft that will require but little correction by his employer. In this edition the important dissertation on Registration of Title has been rewritten; while this dissertation is necessarily concise, it discusses many of the more important matters arising under the Land Transfer Acts, 1875 and 1897, and displays the usual accuracy of the editor. The book also contains several precedents relating to registered land. The editor has made a new heading, 'Instruments relating to the Administration of the Estates of Deceased Persons,' on which he has collected precedents which in former editions were scattered about in the

book and some new precedents. The dissertations and notes appear to have been thoroughly revised. We observe that the editor adopts the scheme, stated by Mr. Wolstenholme to have been devised by Mr. Sargant, of making the mortgagor a trustee for the mortgagee of the last days of a term mortgaged by subdemise, with power to the mortgagee to appoint a new trustee in his place, see vol. I. p. 527, and has adapted the same scheme to equitable mortgages, see *London and County Bank* v. *Goddard* [1897] 1 Ch. 642.

The editor expresses his gratitude to Messrs. Brickdale and Sheldon for allowing him to see the proof-sheets of their work on the Land Transfer Acts, and to Mr. B. L. Cherry for valuable assistance.

We do not doubt that this edition will meet with the same favourable reception that its predecessors met with.

Roman Canon Law in the Church of England. Six Essays by Frederic William Maitland. London: Methuen & Co. 1898. 4to. vi and 184 pp.

The republication of these essays comes very opportunely in the midst of the ecclesiastical 'crisis,' and has already attracted much attention. It is calculated to shake a good many fashionable clerical theories; principally the notion that this country maintained a sort of independent ecclesiastical law of its own in the ages preceding the Reformation, and that the papal decrees had no intrinsic force here until they were received and accepted.

This theory is advanced or maintained in the report of the Ecclesiastical Courts Commission of 1881–3, which, adopting without, as it seems, any independent investigations, the views of Bishop Stubbs, goes so far in this direction as to assert that 'the Canon Law of Rome, although always regarded as of great authority in England, was not held to be binding on the courts.' Professor Maitland's investigations tend to show the exact contrary. In his view the papal canon law was accepted and enforced here simply because it was papal law. Our own Lyndwood contested the validity of English provincial constitutions, and in particular some of Archbishop Peckham, on the very ground that they were inconsistent with the papal law.

Professor Maitland supports his view (and herein his procedure is in marked contrast with that of the Ecclesiastical Courts Commissioners) by plentiful extracts from the commentaries of John of Ayton and Lyndwood; so that if his views are mistaken they can be readily corrected. It is impossible to leave them unnoticed, for a question of this kind interests the learned world in every civilized country where legal history is studied.

Moreover, it is proposed to introduce a Bill to remodel our Ecclesiastical Courts on the lines of this report, of which one of the fundamental propositions now appears to be crumbling away under examination. But perhaps this consideration is not of much practical importance; for if the proposal can survive its resemblance to the proposal of the French Government in regard to their own *Cour de Cassation*, it will probably survive other criticisms based merely on learning and common sense.

The Maritime Codes of Holland and Belgium. By His Honour Judge Raikes, Q.C. London: Effingham Wilson. 1898. 8vo. 242 pp.

His Honour Judge Raikes' translations of foreign maritime codes are as welcome to those interested in the unification of maritime law as to those

whose advice is called for on rights or liabilities accrued to or incurred by British shipowners in foreign waters. The second volume, which has recently appeared, contains the codes of Holland and Belgium, two countries whose geographical position, as Judge Raikes says, make it extremely likely that, if one code is wanted, the other will also be wanted. And as they differ widely one from another, it is highly important that they should be ready of access and accessible in a form which makes comparison easy.

The volume under review is just what is wanted. It is small in size; the translation is in good English, though sufficiently literal to be accurate; the notes, whilst not too voluminous, are enough to put the reader on the track of the chief decisions of the courts; above all, the cross-references to other codes which are appended to each article are likely to be of great use—particularly in international discussion of maritime law, or for comparative criticism of codifying bills such as that on Marine Insurance recently before Parliament. The index, however, though useful in showing the parallel articles of the two codes, is not quite satisfactory. A code and a treatise on a branch of case-law do not, it is true, require the same kind of index. An index of what may be called the 'head-note' type, that is to say, a classification of principles in alphabetical order of subjects, such as is to be found in books like Benjamin on Sale, or Carver on Carriage by Sea, is almost a necessity to a book of case-law, whereas a code is itself an index of principles, and a perfect code is nothing else; a full index of the head-note type would be as long as the code, and all that is wanted is a 'contents' arranged alphabetically. But where a code attempts in a set of detailed rules to apply principles to the varying circumstances of concrete cases, it ceases to be a mere index of principles, and a fuller index to it becomes both possible and useful. Speaking generally, the Dutch Code is, in the above sense, less perfect than the Belgian; it enumerates a great number of principles: but it also attempts to apply those principles to a much greater number of particular cases than the Belgian Code, and for this reason this translation of it would have been more easily accessible had the index been fuller.

Judge Raikes, in his preface to the Dutch Code, says that 'it is perhaps the most minute and careful piece of legislation to be found in any state, at all events prior to the adoption by Germany of the present code of maritime commerce'; and 'it is marvellous how the code, laying down as it does the principles of legislation, has been found capable of adoption to the varying conditions of trade,' in contrast, as he says, with 'the inelastic provisions' of our own maritime legislation. This statement is open to criticism. In the first place, the Dutch Code contains many inelastic provisions, and is much less limited to declaration of principles than the Belgian. The subject of collisions will illustrate the point. The Belgian Code contains only two articles upon the principles affecting collisions, §§ 228 and 229, by which it is laid down that (*a*) in the case of inevitable accident each ship bears its own loss, (*b*) where one ship is solely to blame, it will bear all the damages, even though a pilot is on board, (*c*) where both ships are in fault, the two ships bear the total damages between them proportionately to the degree of their faults. No attempt is made to apply these principles to concrete cases. The Dutch Code, on the other hand, declares the principles affecting collisions in eleven articles (534 to 544), but in addition to declaring the principles, directs their application to particular cases according to certain fixed rules. The following is an epitome of the eleven articles:—§ 534. Where one ship is solely to blame, it will bear the whole damage (which Judge Raikes explains in his note has been decided to include only 'material damage,' i. e. excluding demur-

rage, loss of charter, &c.). § 535. If both ships are in fault, and (§ 536) in case of inevitable accident, even though (§ 537) one ship is in ballast, each ship bears its own loss. § 538. In case of inscrutable fault the total damage of ships and cargoes is borne by each of them in proportion to their values. § 539. If a ship is lost on its voyage after a collision, the loss is presumed to have been caused by the collision. § 540. A ship which, without fault, collides with a ship at anchor, will pay half the damage sustained by the ship at anchor, unless the latter might have prevented the loss. § 541. A ship which, getting adrift, cuts the cables of a ship at anchor, is liable for any damage the latter may sustain by parting from her anchors. § 542. Where ships in harbour or dock fall foul of one another by reason of an abnormally high tide, heavy sea, or gale, each bears its own loss. § 543. A commander who refuses to shift his birth at the request of a ship aground is liable for any damage done to the ship aground. § 544. Commanders are liable for any damage resulting from failure to buoy their anchors.

The tendency of the Dutch Code to pass beyond enunciation of principle into enumeration of concrete cases leads indirectly to two bad results. Firstly, many of the provisions are arbitrary. This defect is apparent in the law of collisions epitomized above. But it is illustrated by many other provisions: e.g. the definitions of the twenty-three different cases of general average (art. 699), or of the seven different cases of particular average (art. 701); art. 457, which provides that in Holland or Dutch colonies, in the absence of provision in the charterparty, fifteen lay-days are allowed to load or discharge: or art. 464, which enacts that when a charterer has, within the lay-days, loaded no cargo, the shipowner is entitled at his option either (1) to demurrage for the time he waits after the lay-days, or (2) to consider the charterparty broken, and to claim half the agreed freight, primage, and average, or (3) after three days' notice to proceed on the voyage without cargo, and claim the full freight and demurrage. Secondly, some of the rules laid down are really rules of evidence, and should not be treated as rules of substantive law at all. It is a commonplace that this defect characterizes much continental law; but the Dutch Code shows that the defect originates in the use of a code for describing concrete cases instead of for declaring abstract principles. And it is because continental law is contained in codes that it is so often vitiated by this fault.

Judge Raikes praises the Dutch Code which has sufficed without material alteration to meet the needs of maritime business in Holland for over sixty years, and disparages British legislation on merchant shipping, to which he says almost every year some statute is added. But this comparison is misleading. It is true that there have been, since the Merchant Shipping Act of 1854, some forty Merchant Shipping Acts, now codified by the Merchant Shipping Act, 1894. There, however, the justice of the comparison ends. The Dutch Code and British Merchant Shipping Legislation differ in kind. The Dutch Code declares or purports to declare the common law and admiralty law of Holland. The British Merchant Shipping Acts, on the contrary (unlike the Bills of Exchange or the Sale of Goods Acts or the Marine Insurance Bill), lay down no principles of law, and are concerned only with the regulation and management of ships and their crews: their provisions are not declaratory, but directory, making, not stating the law. But after all, the preface to a translation is not the most important part of the book, and the translation seems well done and must certainly be useful.

Outlines of English Legal History. By A. T. Carter. London: Butterworth & Co. 1899. 8vo. viii and 216 pp. (10*s.* 6*d.*)

This is a most useful book in a small compass, and the only general objection we have to make is that the title is a misnomer. It does not cover the 'outlines of legal history' in general; in fact there is very little about substantive law, and not much about procedure. What is really dealt with is the history of jurisdictions, with some incidental explanation of the process of the courts, but not of the pleadings and other acts of the parties. In this field Mr. Carter has brought together a great deal of information which not only beginners but trained lawyers and students of history might find it by no means easy to lay hands on. The learned reader can verify this if he pleases by turning to the chapters on the King's Council and the Star Chamber.

We have a few criticisms on points of the earlier history.—The fable of the *Mirror* about Alfred hanging unjust judges ought not to be repeated even in any qualified form.—The much cited twelve thanes of Æthelred's laws were, for all that appears, peculiar to the Danelaw, and it is not safe to connect them with the English grand jury (see L. Q. R. ix. 278).—There was no feeling of 'hardship' about trying a man by jury when he refused to put himself upon the country; the trouble was the supposed want of jurisdiction. After all it is only of late years that the Court has acquired power in civil matters to do for and in the name of an obstinate party an act which he ought to do, such as executing a conveyance. The present writer has seen in an abstract of title an actual case of persons going to prison and staying there several years rather than convey some land to a railway company.—Then, to go a little farther back in time, the great plea on Penenden Heath in which Lanfranc recovered the rights of the see of Canterbury had nothing to do with a jury or inquest of any kind. It was a special county court at which the king directed his officers to secure the attendance among the suitors—not as a separate body—of a sufficient number of Englishmen acquainted with the old customs. Mr. Carter's language about 'a mixed jury of French and English ... who apparently *are not sworn*' carries its own contradiction with it. So again 'dicunt homines comitatus' in Domesday can only mean a doom of the county court. When jurors 'dicunt' it is 'super sacramentum suum.' The whole account of juries should be revised in the light of Prof. Thayer's work, which Mr. Carter does not seem to have used.

There is a certain want of proportion about the book as it stands, which we hope to see removed in an enlarged second edition.

The Law of Negligence. By Thomas William Saunders. Second Edition, re-written with the addition of the Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1897, by E. Blackwood Wright. London: Butterworth & Co. 1898. 8vo. xxix and 276 pp. (9*s.*)

This book (really a new book, though in name a new edition) appears likely to fulfil its purpose of giving practitioners a guide to the subject which will suffice for all ordinary purposes and be handier than Mr. Beven's monumental work. It is clear and, so far as we have tested it, accurate, though some of the finer distinctions are overlooked, e.g. the difference between responsibility for the negligence of an 'independent contractor' and the still more stringent rule in *Rylands* v. *Fletcher*. Mr. Wright abandons the attempt to make anything more of 'gross' in the term 'gross

negligence' than a vituperative epithet; and we think this the better opinion. To say that a man is liable only for gross negligence is at best a clumsy form of saying that he is bound only to exercise the prudence of an ordinary unskilled person. Under the head of contributory negligence it might have been well to notice the American doctrine that the plaintiff is bound in the first instance to show that he was using due care. It is not sound doctrine in our opinion, or supported by English authority, but it is perhaps not safe to disregard the risk of its being used in argument.

We should have liked, in the interest of law as a science, to see a little more weighing and a little less counting of authorities; but for Nisi Prius purposes it may be more useful to have authority of some sort, and as much of it as you can, than to have a critical estimate of its value.

One more question: Why does almost every writer who mentions the rule of the road omit to mention its statutory confirmation (see 14 & 15 Vict. c. 92, s. 13)?

Studies in International Law. By THOMAS ERSKINE HOLLAND. Oxford: Clarendon Press. 1898. 8vo. viii and 314 pp. (10*s.* 6*d.*)

PROFESSOR HOLLAND disclaims any pretensions on the part of this volume to be more than a collection of by-studies on some special points of International Law. Most of the papers have already been published as review articles, and they are now reprinted substantially as they were originally written, though brought up to date where necessary by additional notes. Such collected articles on special branches of a subject, presented to the public from time to time as the results of careful study, unaccompanied by the commonplace materials which go to the making of a text-book, are always valuable. Among other interesting subjects dealt with are the Bombardment of Open Coast Towns, Pacific Blockade, and the International position of the Suez Canal. On the last of these subjects Professor Holland has added a note which explains Mr. (now Lord) Curzon's statement in the House of Commons of July 12, 1898, that the terms of the Suez Canal Convention of October 29, 1888, 'have not been brought into practical operation,' p. 293. Great Britain made a reserve at the last sitting of the Conference of Paris on June 13, 1885, which was repeated by Lord Salisbury on October 21, 1887, only three days before the Convention was signed on behalf of the Governments of France and Great Britain, and 'which was afterwards carefully brought to the knowledge of all the powers concerned' that the application of the provisions of the Treaty was subject to their being compatible with the transitory and exceptional state of things in Egypt and with the freedom of action of the British Government during the occupation of Egypt by Her Majesty's forces. This reservation is apt to be overlooked by those who talk of the neutralization of the Suez Canal. It will be remembered that the Convention was signed on behalf of Great Britain and France at Paris on October 24, 1887, and after receiving the approval of the other Powers in succession, that of the Porte being delayed till June 29, 1888, was eventually signed at Constantinople on October 29, by the Plenipotentiaries of the nine Powers, and was ratified on December 22, 1888.

Cases on International Law during the Chino-Japanese War. By SAKUYÉ TAKAHASHI. Cambridge: University Press. 1899. 8vo. xxviii and 219 pp.

SOME time ago (1896) we had occasion to review a book by Professor Ariga, who acted as legal adviser to the Japanese army in the Corean

campaign; and we now have a book by Professor Takahashi, who acted as legal adviser to the Admiral commanding the Japanese fleet during the same war. The two books complete each other, as the author states in his preface, the present work being confined to International Law at sea, as Professor Ariga's was confined to its application in the operations of the land forces. The interesting note on 'the Gaelic' and continuous voyages by Professor Westlake, published in the January number of this REVIEW, is given as a part of an introduction contributed by our learned friend, and the official documents of which translations are given as appendices are a valuable addition to the raw material of the international jurist. The author's system is first to show what is the principle admitted by acknowledged authorities on International Law, and then how the Japanese naval authorities under his advice applied it. As regards prize law the chief authorities followed were the English Naval Prize Act, 1864, and the German Prize Act of the same year. Japan, however, has very properly departed from the European models in giving no prize to the captors, 'who are deemed to seize property at sea on the ground of some breach of law connected with it, for the sake of their country and not for their own sake,' p. 12. A prize court was established at Sasebo, but, though some hundred vessels were visited by Japanese cruisers only one was taken in for adjudication. Professor Takahashi reviews the different cases which gave rise to questions, viz. those of the Kow-Shing, Gaelic, Sydney, Yik-sang, Chaochow Foo, Kwang-chi and Too-nang, and discusses the surrender of the Chinese squadron, Cameron's case, Dr. Kirke's claim, the bombardment of Tung-chow, the Japanese requisition regulations, and winds up as follows: 'The most interesting feature of the above facts is that they furnish additional proof of Japan's resolve to conduct the war in accordance with the most civilized modern principles: and it must be noticed how honourable these actions are to Japan, especially when we remember that she was fighting against a nation which acknowledges no law of war, makes no provision whatever for the proper treatment of the private property of the subjects of a hostile state, and does not attempt by a resolute effort to restrain its troops from pillage and incendiarism even within its own territories,' p. 164.

A Digest of the Death Duties (alphabetically arranged), with numerous examples illustrating their incidence, an Index of Titles, and an Appendix of Statutes. By A. W. NORMAN. Second Edition. London: Wm. Clowes & Sons, Lim. 1899. La. 8vo. xli and 532 pp. (25*s.*)

THE second edition of Mr. Norman's book is an improvement on the first: and that is saying a good deal. The alphabetical arrangement now followed has many advantages: it is easier to find the law on a given point, and the huge index in the first edition—larger than the text itself—has in the natural course of things disappeared. This edition seems to exhaust the law on this complex subject. One can find the points in *Lord Cowley's* case ('98, 1 Q.B. 355, C. A.) or *Lord Wolverton's* case ('98, A.C. 535) or the scale of Probate and Succession Duties in force in a British self-governing Colony. The diversity of Colonial practice is not encouraging to the advocate of fiscal unity within the Empire. Natal is shown to be an ideal place for the beneficiary, for no death duties are levied: while its neighbour, the Cape Colony, encourages charity by exempting from duty gifts to hospitals. Manitoba charges nothing to ancestors or lineal descendants

where the property passing does not exceed $25,000; and Queensland exacts a maximum duty of 20 per cent. from large estates where the beneficiary is a stranger in blood. Under the heading 'Dates' is given a synopsis of the changes in the statutory law of the subject since 1805.

In a book so generally excellent it is a pity that more attention was not given to the references to cases. If we turn to *Att.-Gen.* v. *Cowley*, the Law Reports reference is to the decision below: the case is reported on appeal, '98, 1 Q. B. 355 (now reversed in H. L. [1899] W. N. p. 32). To *Att.-Gen.* v. *Wolverton* in the H. L. only a Law Times reference is given, although the case is to be found both in the Law Reports and the Law Journal. These are omissions of substance. To go to matters of form 'C. A. (1898) 435' (p. 57) and 'C. A. 145' (p. 337) are rather puzzling. '1 Sco. Sess. Ca. 4to Ser.' (p. 143) is presumably meant to be a reference to 1 Rettie; and 'L. R. 1 Eng. & Ir. H. L. App.' (pp. 284, 434, 485) is as long a form of reference to L. R. 1 H. L. as we remember to have seen.

A Digest of Cases relating to Criminal Law. By JOHN MEWS. London: Sweet & Maxwell, Lim., and Stevens & Sons, Lim. 1898. La. 8vo. xi and 862 pp.

'LET me see your cases and I'll get through them' was a characteristic *obiter dictum* of an eminent judge, renowned as an authority on criminal law. To appreciate the observation one ought to know what the cases in question were, which is not recorded; but in all probability they are duly referred to in the volume before us, and that 'though some points (see *R.* v. *Checketts*, 6 M. & S. 88, at p. 653) are of obsolete pleading, and some (see *R.* v. *Davis*, 6 C. & P. 177, at p. 741) are not law.' The fact is that lawyers themselves have effected a great reformation in the criminal law, by letting large parts of it fall into oblivion; and the consequence is that an unusually large proportion of the cases which Mr. Mews has so laboriously collected are of only archæological interest. Then, too, the fact that this volume is only a part of a far larger work (of which we hold that the critic may take judicial notice in favour of the prisoner) leads to the omission of cases, such as *R.* v. *Erdheim*, '96, 2 Q. B. 266, which, though they may be found elsewhere, are wanted by the practitioner in the Crown Court. Saving these two objections we have no very serious fault to find either with the arrangement of this work or with its contents. The guidance of the alphabet is hardly made any use of, which is a shock to the reader for a moment, but the arrangement of what is practically a Table of Contents is such that by reference to it we have generally experienced no difficulty in finding cases the name of which we have forgotten, though we remembered their effects. The cases dealing with lunacy, for example, are easily found without a reference to the Table of Cases, but we cannot say the same with regard to those which deal with attempts. We need not expect Mr. Mews to give us much assistance in elucidating the meaning of doubtful cases; but he commits a distinct blunder in not recording the fact that *R.* v. *Lillyman* was decided on a count in trying which the consent of the chief witness was not in issue. We are obliged to express our regret that, in a work of such importance as this undoubtedly is, the usual order of quoting reports should not be followed, and that in the Table of Cases, where properly enough only one reference is given, that reference should not be to the Law Reports.

On the whole, however, the book is one the possession of which is a matter

of necessity to a good many practitioners, and though it does not reach the highest standard for such work, it does not fall below what the profession at large expect of it.

Roscoe's Digest of the Law of Evidence in Criminal Cases. Twelfth Edition. By A. P. Perceval Keep. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1898. 8vo. lxii and 988 pp. (£1 11*s.* 6*d.*)

In his new edition of this well-known work Mr. Keep has managed to reduce a book of 1060 pages to one of 998; and it was not till we had recourse to the obviously unfair method of a textual comparison of this edition with its predecessor that we were able to trace any signs of a deletion. As it is, we are in a position to point out to our readers that there is a slip on page 270, and to assure them that any one who can correct it off-hand will show a very creditable, though possibly useless, acquaintance with statute law. Though such a book as Roscoe can of course never be a really high authority on matters of doubt, comment may sometimes elucidate a mere abstract of cases, but of comment of any knd Mr. Keep seems quite innocent. The queer jumble of cases quoted on page 270, for example, as to what constitutes an attempt, might be made reasonably clear with very slight pains. As it is, it represents only half a dozen decisions, most of them slightly considered, and all of them confined to the narrowest possible limits of application. The matter could have been made clearer, too, had Mr. Keep not omitted to indicate the facts in *R.* v. *Brown*. The account given of the decision in *R.* v. *Gordon* is correct, but we should have liked to see some notice of the fact that it is as inconsistent with the law of false pretences, as understood at the time when it was given, as it is with the subsequent case of *R.* v. *Jones*, 1891, 1 Q. B. 119, which, oddly enough, Mr. Keep does not notice. The explanation, of course, is that Gordon was a well-known money-lender, an element in the case which, whatever influence it may have properly exercised on the Court, ought to have been adumbrated in a discreet and respectful manner. Modern legislation is duly noticed, and on the whole well enough; and the index is quite up to the highest standard.

The Criminal Evidence Act, 1898. By A. R. Butterworth. London: Sweet & Maxwell, Lim. 1898. 8vo. xv and 107 pp.

The Criminal Evidence Act of last session is still fresh enough to stand the very thorough system of expounding its provisions which Mr. Butterworth has adopted. As a rule, where a single statute is edited with copious notes, an introduction is unnecessary; in the present case, however, where it has been the subject of keen professional controversy, we are glad to find the objections brought against it fairly set out in a permanent and easily accessible form. In his notes on the Act itself Mr. Butterworth has spared neither pains nor space; and though according to modern ideas, he places an excessive value on decided cases, and the strict construction of enactments relating to evidence and procedure, this in a commentator is a fault on the right side. He is right in his anticipations of what the law would be decided to be as to allowing prisoners to appear before the grand jury; but *R.* v. *Gardner* shows that he is over-ingenious in suggesting that prosecuting counsel loses the right to sum up when the prisoner is the only witness called. His treatment of the crucial point of the Act, the cross-examination of prisoners to credit, is judicious, though we expect that it is

likely to be settled on more rough and ready lines than he suggests. He brings out clearly the fact that *R.* v. *Wealand* and *R.* v. *Paul* are still binding on the Courts, and that it will still be the duty of a judge to point out that the jury must remember what the wife said, when they are considering the prisoner's guilt as to offence *A*, but are to forget it when it is a question of offence *B*. He is right in our view in holding the two cases inconsistent, and he brings out the likeness between the two sufficiently clearly to prevent us regretting that he prefers what we hold to be the wrong decision. He has not foreseen the point of the controversy between Mr. Haden Corser and Sir Harry Poland as to the position of the prisoner's witness before a committing magistrate, which we regret because it supplies a curious instance of sound practice over-riding an express enactment. The table of offences in the schedule to the Act is worked out in a way likely to afford the greatest assistance to the practitioner, and with the exception of a few sins of commission we have nothing but praise for his Appendix of Statutes relating to evidence.

Stone's Justice's Manual: being the yearly Justice's Practice: A Guide to the ordinary duties of a Justice of the Peace. Thirty-first Edition. Edited by GEORGE B. KENNETT. London: Shaw & Sons; Butterworth & Co. 1899. 8vo. lxviii and 1127 pp. (25*s.*)

The Magistrate's Annual Practice, 1899: being a Compendium of the Law and Practice relating to matters occupying the attention of Courts of Summary Jurisdiction, &c. By CHARLES MILNER ATKINSON, Stipendiary Magistrate for the City of Leeds. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1899. 8vo. lxxxiii and 866 pp. (20*s.*)

BOTH these useful books were noticed in this REVIEW in the April number of 1898. But statutes and decisions accumulate. In the preface to this fourth edition of the Magistrate's Annual Practice it is stated that, 'During the current year (1898) there has been an unusually large number of decisions of the High Court bearing directly upon questions connected with magisterial law. It has been necessary to refer to nearly seventy such decisions in the body of this work.'

Both works treat of such Acts of Parliament as the Criminal Evidence Act, the Vaccination Act, the Inebriates Act, the Prisons Act, and the Locomotive Act (all 1898). The Criminal Evidence Act has naturally been the subject of a great deal of comment both from the bench and the outside public. Some few of the judges, holding strong views hostile to such an innovation, have expressed themselves accordingly, and there have been doubts as to the interpretation of the expression 'at every stage of the proceedings' in the Act. It has been, however, pretty well decided that the expression shall apply to proceedings before magistrates, and of course at the trial, but not when the case is before the grand jury. Before magistrates it is usual in indictable offences, if the case is at all likely to be committed for trial, for the accused to be advised to reserve his defence.

The Vaccination Act has called forth comments and criticisms from all quarters. But as it is difficult to anticipate the effects of an Act of Parliament, time alone can show the effects of this particular Act.

The Prisons Act, and the Inebriates Act, are both important in their way, but have not as yet come into operation for reasons explained in these books. The Locomotive Act is an additional protection to the public.

As before said, these works can be confidently recommended to justices of the peace and their clerks. The clerks usually have the manual at hand to refer to, and it would be as well if the justices had one or the other at their fingers' ends.

The Yearly Supreme Court Practice for 1899. By M. Muir Mackenzie, S. G. Lushington, and John Charles Fox; assisted by C. G. S. McAlester, Archibald Read, and Bruce L. Richmond. London: Butterworth & Co. 8vo. cxxxi and 974 pp. (20*s.* net.)

The present work is a bold undertaking. Its sole claim to recognition is as a rival to the Annual Practice. This claim rests substantially on cheapness and a reduction in bulk. The practitioner here finds in one volume of some 1,100 pages (inclusive of the index) the substance of what is contained in the two volumes of the older publication. The reduction in bulk has been attained in a large measure by the exclusion of the earlier authorities, where that course could safely be adopted. So long as Archbold and Daniell are accepted as the leading text-books on the practice of the two Divisions of the High Court, this is a judicious principle. It may well be doubted, however, whether further space might not be gained, without in any way detracting from the utility of the work as a handy book of reference on the practice, by omitting many of the forms. The bulk of pleadings are settled by a reference to Daniell's Chancery forms, or Bullen and Leake, or the pleader's notes of precedents, and originating summonses by a reference to Marcy; and it may safely be assumed that solicitors avail themselves of the printed forms which may be purchased at the Courts and elsewhere. It is difficult to understand, under these circumstances, why an annual publication should continue to be encumbered with what is, in that place, of little practical utility. The editors and their assistants must, however, be congratulated on the production of a work which deserves to succeed as a step in the right direction. In the earlier portion the Judicature Acts are printed in the form of a Consolidating Statute, and the notes follow the sections to which they refer. In the portion relating to the rules the notes are printed as footnotes, a very convenient course. The date of the decision is inserted between the name of the case and the reference, but in view of the fact that the table of cases gives the references to contemporaneous reports, the necessity for this course may be disputed. The index, it appears, has occupied two members of the Bar for three months, and it cannot be said that the time has been wasted. For the benefit of those practitioners who desire a less bulky work, the publishers supply a copy printed on thinner paper. Perhaps it might be advisable in subsequent years to make the title on the cover agree with that on the title-page, the latter being the more concise.

A Memoir of Lord Bramwell, with a Portrait. By Charles Fairfield. London: Macmillan & Co., Lim. 1898. 8vo. 373 pp.

Lord Bramwell was a great lawyer and a great judge, but he had too original a mind and too independent a judgment to be kept confined within the ring-fence of positive law. He realized, as every true lawyer must, that the law is inextricably interwoven with morality, with politics, with political economy, with sociology generally; and with his vigorous intellect and shrewd commonsense it was an irresistible temptation to make raids into the demesnes adjoining the law's bailiwick and try his cut and thrust

logic on the passing problems of the day. It would have been a great pity if these excursuses of Lord Bramwell—the Sibylline leaves of pamphlets, addresses and letters to the Times—had wanted an historian: for whatever it was which was the theme, whether Nationalization of the Land, or Drink, or Liberty and Property Defence, or Bargains and sticking to them, or the sale of Serjeants' Inn, or Marriage with a Deceased Wife's Sister, Lord Bramwell had always something interesting to say about it, and said it in such a striking way as compelled attention. There was always an admirable sanity too about his views: witness for instance his criticism of the apologists of kleptomania and weak-minded criminals (at p. 44). Hence, though his durable reputation must always rest on his performances as a judge, we cordially welcome this record of his *πάρεργα* or extra-judicial utterances, given us by Mr. Fairfield with a running accompaniment of brilliant and sometimes oracular comment in the Carlylean vein: but alas! we cannot welcome the portrait. How inadequate it is to express that face of the old judge—what a study it was!—with its blended gravity, shrewdness, humour, and bonhomie. Incidentally too, we learn a good deal that is fresh about the personality of the judge as well as his views—his country rambles after the day's work was done on circuit, his talks about judicial duty with Chief Baron Pollock, his love for his fireside and a book or a game of billiards in preference to the club or 'society,' his early confidence in his future.

'I have it in me, and by G— it shall come out,' exclaimed Sheridan, as he declared for a political career. Lord Bramwell had the same confidence in himself, and before he had got a brief at the bar he was telling his intimates that 'he had got it in him and meant to rise to a seat on the Bench.' In some men such confidence would be mere bumptiousness, but in men like Lord Campbell, Lord Westbury, Lord Beaconsfield or Lord Bramwell, it sprang from the conscious possession of great powers. An anecdote told by Mr. Fairfield shows how strongly his acuteness impressed his contemporaries. A schoolfellow of his, Channell—afterwards the Baron—held a brief at Maidstone Assizes. Consultation with the solicitors revealed a technical flaw in the pleadings drawn by them which in those days would have proved absolutely fatal. The solicitors could only hope that it would not be discovered. 'Who's against us?' asked Channell. 'Oh!' was the reply, 'a Mr. Bramwell. Nobody ever heard of him before.' 'Then, gentlemen, we're done,' was the advocate's remark. 'I was at school with that gentleman.' And done they were.

Here is another anecdote for which we are grateful to Mr. Fairfield. One spring day in the year 1889 the local constable at Edenbridge noticed Lord Bramwell intently watching a noisy group of village boys apparently much excited about something. It was the first day of the cricket season, and they were in fact drawing up rules for their cricket club. Fancying they might have annoyed the old lord in some way, the constable approached and asked whether such was the case. 'No, no,' said Lord Bramwell; 'those lads have been teaching me something—how the Common Law was invented.' The constable considered this a remarkable proof of juvenile precocity, and observed: 'It is wonderful what they do learn at school nowadays, my lord,—over-education, I call it.'

How true it is that the mind sees what it brings! The constable saw nothing but a pack of noisy boys. Before the eyes of the old judge—the master of the Common Law—there was unrolling itself on that village green the long pageant of our legal history.

The Origin and Growth of the English Constitution. Part II. By Hannis Taylor. Boston and New York: Houghton, Mifflin & Co.; London: Sampson Low, Marston, Searle & Rivington. 1898. xliv and 645 pp.

The first volume of Mr. Hannis Taylor's laborious work, which appeared some time ago, and was duly noticed in the Law Quarterly Review, dealt with the origin and growth of the English Constitution. To quote the author, 'the attempt was made to draw out as one unbroken story that marvellous process of change and of growth through which the English constitutional system passed during the period intervening between the Teutonic conquest and settlement of Britain and the end of the fifteenth century.' The second volume carries the story on to the present day. It is divided into four books, which treat respectively of the York and Tudor Monarchy, the Stuarts and the Puritan Revolution, the Restoration and the Revolution of 1688, and the growth of the Modern Ministerial system. Under these general headings practically every subject in any way connected with the constitution finds a place. Indeed, it is not always easy to discover what Mr. Taylor means by constitutional history. The last chapter, which deals with such problems as the Poor Law, the Educational system, and Local Government, is perhaps one of the most interesting, inasmuch as Mr. Taylor has brought his subject more completely up to modern times than most historians.

In a compilation of this description it is perhaps scarcely possible to keep thoroughly abreast of the most recent work, or to refer to many original authorities. Though Mr. Taylor's researches have been mainly confined to secondary authorities, they have evidently been of an extensive nature. He has read or consulted an enormous number of books, to which he gives careful and ample references. More use might perhaps have been made of foreign research; for instance, with reference to the publication of debates the records of the École des Chartes should have been consulted. Finally, we hope that when Mr. Taylor brings out a new edition of his second volume he will take that opportunity of correcting the numerous small faults of style and grammar which are scattered broadcast over his pages. Split infinitives, 'and whiches' and the like are both annoying to the reader and unworthy of the author of a meritorious, conscientious and comprehensive work.

Practice on the Summons for Directions. By Francis A. Stringer. London: Sweet & Maxwell, Lim. 1899. 8vo. 139 pp. (5*s.*)

When machinery is as complex and delicate as that of our present High Court procedure the introduction of fresh wheels is sure to cause some derangement, and this is what has happened with the new Summons for Directions. It has not been adjusted with quite enough care to the various points at which it comes in contact with the existing machinery. But the principle of it is sound—that is the important thing—and it will work smoothly in time. Hitherto it has been too much the practice to launch an action and let it drift. Now the plaintiff must define his legal course—or get it defined for him by the master—and then steer straight for it. Then, instead of a succession of summonses on interlocutory matters all are comprehended in one application, as far as the necessities of the case can be foreseen: in other words, the Court has the moulding of the action from the outset—from writ to trial—in its hands through the medium of an

experienced official, and the discretionary jurisdiction is practically unlimited; for, as Mr. Stringer points out, the Court of Appeal severely discountenances appeals from Chambers on disputed points. This is attended with some inconveniences while the practice is unsettled: for there are many thorny points for the practitioner: but in truth a book like this of Mr. Stringer —a master of practice—does more to rationalize and settle the practice than many decisions of the Court of Appeal, and we should imagine that there would be few practitioners who would care to be without the book at their elbow.

A Treatise upon French Commercial Law and the Practice of all the Courts, with a Theoretical and Practical Commentary and the Texts of the Laws relating thereto, including the entire Code of Commerce, &c. By LEOPOLD GOIRAND. Second Edition. London: Stevens & Sons, Lim. 1898. 8vo. vi and 894 pp. (20*s.*)

M. GOIRAND published the first edition of this book in 1880. In the present edition he has brought it up to date. By a curious oversight there is no table of contents, but a glance over the appendices shows that the author has kept his promise of completing his book with recent legislation. The following are the subjects dealt with: Companies, Stock Brokers, Cheques, Loans and Pledges, Bonded Warehouses, Bills of Exchange, Stamp Duties, Maritime Law, Common Carriers, Agency, Bankruptcy, Trade Marks and Patterns, and Patents. A valuable addition to the work is a glossary giving the meaning of the French words which have been left untranslated for want of exact English equivalents. We have noticed a few oversights, such as (p. 862) 'Divorce has been abolished by the law of 1816, but judicial separation can still be resorted to.' This was true in 1880. A new Act has since then re-legalized divorce. The author seems also unaware that such a word as *surestaries* has a practically exact English equivalent in demurrage. Knowledge of such words as 'assets' and 'audit' would have helped him over some roundabout explanations. As the author anticipates that a third edition may become necessary and invites suggestions, we may say that the book might be much improved by extending and improving the glossary which is a really valuable part of the work, notwithstanding the one or two faults we have observed.

We have also received:—

The Science of Jurisprudence, chiefly intended for Indian Students. By Sir W. H. RATTIGAN, Q.C. Third Edition. London: Wildy & Sons. 1899. 8vo. xii and 440 pp.—This book has been much improved in appearance and handiness. The fact of a work dealing with such abstract matters having reached a third edition is evidence enough of its usefulness for the students, mainly Anglo-Indian, to whom it is addressed. We still think that the learned author Romanizes and Germanizes too much. Thus we read at p. 144:—'Possession ceases as soon as one of the elements which have been declared to be necessary for its constitution has ceased to be operative.' Whether more or less reasonable than this, the rule of the Common Law is quite different: possession once established does not depend on the continuance of all the conditions, but can be lost or determined only in one of certain definite ways. If the Roman and not the Common Law rule is understood to prevail in British India, we should like to know why. Turning to pure Roman Law, we are still in doubt whether Sir W. Rattigan

does or does not intend to maintain *contra mundum* Savigny's old derivation of the Stipulation from Nexum. A fuller table of contents is in our opinion desirable.

The Law of Succession, Testamentary and Intestate. By W. S. Holdsworth and C. W. Vickers. Oxford: B. H. Blackwell; London: Stevens & Sons, Lim. 1899. 8vo. xiv and 311 pp. (10*s.* 6*d.*)—This book is intended for the use of students. The authors expressly disclaim any intention of writing for the practising lawyer. To quote the Preface, the book 'omits much of the detailed application of those principles to be found in innumerable decided cases. It omits parts of the subject which seem to fall more naturally under other branches of the law, or to be unsuited to the needs of students. Thus it neither attempts to treat of those topics which fall within the domain of Private International Law, nor of those parts of the law which deal with the construction of wills and with the Death Duties.' But, notwithstanding these limitations, Messrs. Holdsworth and Vickers have contrived to get a substantial part of the law of the subject into a small space. There are chapters on the Execution and Revocation of Wills; the Capacity of Testators; Legacies; Unlawful Dispositions by Will; Intestate Succession; Executors and Administrators; and Probate Jurisdiction and Procedure. There is also a useful Appendix of Probate Forms; and recent cases are mostly accounted for. Notwithstanding the authors' modest disclaimer we think that even the practising lawyer may find much that is useful in the book. It should be noted that the references to Pollock and Maitland's History of English Law are to the first edition.

English Patent Law: its History, Literature, and Library. By E. Wyndham Hulme. London: Library Bureau, Lim. 1898. 8vo. 14 pp.—In these fourteen pages Mr. Hulme has written an interesting and lucid account of the history and literature of English Patent Law. He shows that the system is of quite respectable antiquity, its inception apparently being a commission granted to one Thomas Lodge in 1561 in connexion with the improvement in the standard of the coinage. Mr. Hulme defends the monopoly system against the strictures passed upon it, and shows that the growth of the system was largely responsible for the great industrial revival that occurred in Elizabeth's reign. Under its influence many languishing trades prospered; and the increase in the number and importance of inventions was directly traceable to the system. Among other important events of the early days of monopolies Mr. Hulme mentions the introduction of the fire engine as a means of raising water, and of pumping engines in mines. Mr. Hulme briefly traces the vicissitudes of the system under the Stuarts and during the Commonwealth. The second (and longer) part of the pamphlet is devoted to the publications and history of the Patent Office—subjects with which Mr. Hulme is specially competent to deal.

The Principles of Bankruptcy, embodying the Bankruptcy Acts 1883 to 1890, and the leading cases thereon, &c. By Richard Ringwood. Seventh Edition. London: Stevens & Haynes. 1899. 8vo. xxxiv and 391 pp. (10*s.* 6*d.*)—This book is intended chiefly for the use of students. It contains a good deal of well-arranged information in a small space and is not beneath the notice of the practitioner. The preface states that about a hundred new cases have been referred to in this edition; additional notes have been made to the pages on Bills of Sale; and the Index has been thoroughly revised. The fact that a seventh edition is called for says much for the utility of the work.

Ruling Cases: arranged, annotated, and edited by ROBERT CAMPBELL. With American Notes by IRVING BROWNE. Vol. XVII. Manorial Right—Mistake. London: Stevens & Sons, Lim.; Boston, Mass.: The Boston Book Co. 1899. La. 8vo. xxiii and 884 pp. (25*s.* net.)—This volume carries us only from Man. to Min., for 'Mistake,' although inserted on the title-page, is dismissed with a forward reference to 'Payment by Mistake' and 'Rectification.' We do not understand how these two heads can be supposed to exhaust the subject. What is to become of such leading cases as *Earl Beauchamp* v. *Winn* and *Cooper* v. *Phibbs*? 'Master and Servant' (wherein *Allen* v. *Flood* is abridged and very meagrely noted) and 'Mines and Minerals' occupy rather more than three-fourths of the volume. The other subjects dealt with are 'Manorial Right,' 'Marriage' and 'Merger.'

Précis de Droit International Privé. By FRANTZ DESPAGNET. Third Edition. Paris: Librairie de la Société du Recueil Général des Lois et des Arrêts. L. Larose. 1898. 8vo. 791 pp. (10 fr.)—That this *Précis* of Private International Law has reached a third edition is evidence that it fulfils its purpose well, and though it is intended only as a text-book for the use of French students, it shows such wide reading on the subject that it will be found useful as a general digest by everybody called upon to deal with the subjects of which it treats. It has the defect of so many French books of being unprovided with an index, and in the case of a book like the present one, in which facts play so important a part, the want is particularly to be regretted. The chapter entitled *Théories préliminaires* gives a most interesting account of the growth of Private International Law in France, and, somewhat condensed, it might form an interesting monograph in English.

Code civil de l'empire du Japon. Livres I, II and III. Traduction par I. MOTONO, M. TOMII. Paris: Larose. 1898. La. 8vo. xiv and 171 pp. —The translators of this instalment of the Japanese Civil Code regret that want of time has prevented them from adding notes, except for the explanation of some specially Japanese terms, or references to Western codes. We regret it also, for the result of this total want of *apparatus criticus* is to make the comparative study of the Code practically impossible for European readers who are not exceptionally familiar with the leading continental systems, and able to dispose of an exceptional amount of leisure.

Every Man's Own Lawyer: a handy book of the Principles of Law and Equity. By a BARRISTER. Thirty-sixth Edition, carefully revised, including the Legislation of 1898. London: Crosby, Lockwood & Son. 1899. 8vo. xvi and 736 pp. (6*s.* 8*d.*)—We have nothing to add to our comments on former editions of this work, except that the motto on the false title-page is more appropriate than it was intended to be.

The Elements of Roman Law Summarized, a concise digest of the matter contained in the Institutes of Gaius and Justinian. By SEYMOUR F. HARRIS. Third Edition, revised. London: Stevens & Haynes. 1899. 8vo. xi and 212 pp.

The Student's Guide to Prideaux's Conveyancing. By JOHN INDERMAUR. Fourth Edition founded on the seventeenth edition of Prideaux. London: Geo. Barber. 1899. viii and 124 pp.

Goodeve's Modern Law of Personal Property. Third Edition, revised and partly re-written by JOHN HERBERT WILLIAMS and WILLIAM MORSE CROWDY. London: Sweet & Maxwell, Lim. 1899. La. 8vo. lvii and 466 pp.—Review will follow.

The Revised Reports. Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. XXXVIII, 1832–1834 (7 Bligh, N.S.; 1 & 2 Knapp; Cooper temp. Brougham; 6 Simons; 4 Barn. & Adol.; 1 Nev. & Manning; 10 Bingham; 3 & 4 Moore & Scott; 1 Cr. & Meeson; 3 Tyrwhitt; 5 Car. & Payne). London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1898. La. 8vo. xv and 873 pp. (25*s.*)

The Annual County Courts Practice, 1899. Edited by WILLIAM CECIL SMYLY, Q.C., Judge of County Courts. Two vols. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1899. 8vo. Vol. I, xxxiii and 1092, Vol. II, xv and 543 pp. (25*s.*)

The Student's Guide to the Principles of Equity. By JOHN INDERMAUR and CHARLES THWAITES. Second Edition. London: Geo. Barber. 8vo. viii and 136 pp. (5*s.*)

A Treatise on the Law of Easements. By CHARLES JAMES GALE. Seventh Edition. By G. CAVE. London: Sweet & Maxwell, Lim. La. 8vo. xxvii and 609 pp.—Review will follow.

Principles of the Criminal Law. By SEYMOUR F. HARRIS. Eighth Edition. By CHARLES L. ATTENBOROUGH. London: Stevens & Haynes. 1899. 8vo. xliii and 580 pp.

The Law of Principal and Surety. By S. A. T. ROWLATT. London: Stevens & Haynes. 1899. 8vo. xlv and 350 pp.

Journal of the Society of Comparative Legislation. Edited for the Society by JOHN MACDONELL, C.B., and EDWARD MANSON. New Series, No. I. March, 1899. London: John Murray. 8vo. xvi and 197 pp. (5*s.*)

The Law of Inebriate Reformatories and Retreats, comprising the Inebriates Acts, 1879 *to* 1898, with notes, &c. By WYATT PAINE. London: Sweet & Maxwell, Lim. 1899. 8vo. xxxvii and 226 pp. (6*s.*)

The Solicitor's Clerk. By CHARLES JONES. Fifth and revised edition. London: Effingham Wilson. 1899. 8vo. 260 pp. (2*s.* 6*d.* net.)

Lectures on the Fourteenth Article of Amendment to the Constitution of the United States, delivered before the Dwight Alumni Association, New York. April–May, 1898. By WILLIAM D. GUTHRIE. Boston: Little, Brown & Co. 1898. xxviii and 265 pp.

The Economic Foundations of Society. By ACHILLE LORIA. Translated from the Second French edition by LINDLEY M. KEASBEY. London: Swan Sonnenschein & Co., Lim. 1899. 8vo. xiv and 385 pp. (3*s.* 6*d.*)

The Powers, Duties, and Liabilities of Executive Officers. By A. W. CHASTER. Fifth Edition. London: Stevens & Haynes. 1899. 8vo. xliv and 277 pp.—Review will follow.

Notes on Perusing Titles, containing practical observations on the points most frequently arising on a perusal of titles to real and leasehold property. By LEWIS E. EMMET. Fourth Edition. London: Jordan & Sons, Lim. 1899. 8vo. xliv and 396 pp. (10*s.* net.)

The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
